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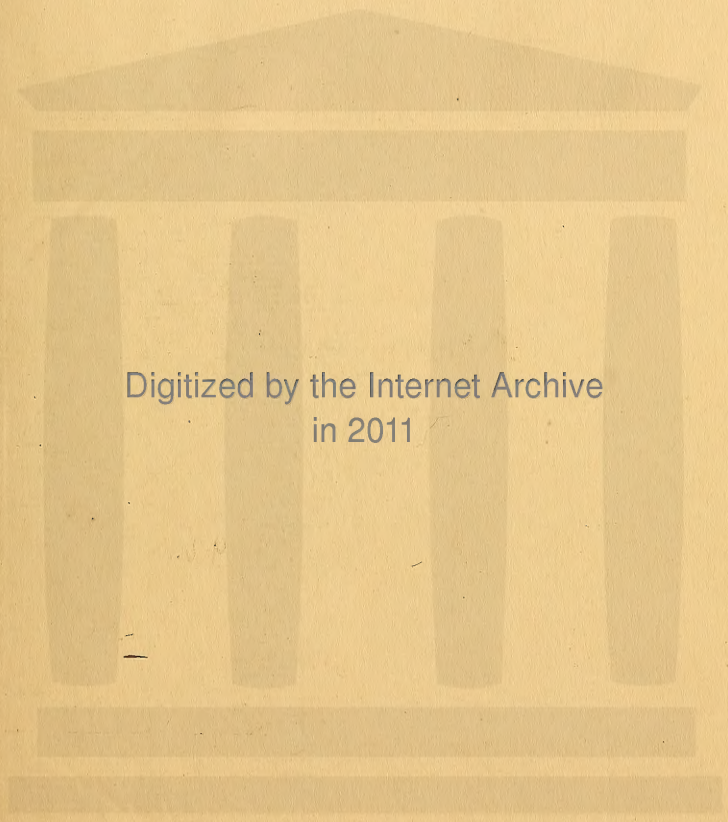
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VERA EFFIGIES GEORGI CROKE EQUITIS

Ut Vultus hominum. Ita Simulacra vultus quæ Marmore. aut ære
funguntur Imbecillæ. ac mortalia sunt: Formæ mentis æternæ: quam
tenere. et exprimere non per alienam materiam. et artem. sed
tuis ipse moribus possis.

Tac in vita Iulij Agric: Socii Sui



R. White sculpsit.

The Second Part
OF THE
REPORTS
OF
Sir George Croke K^t,

Late one of the JUSTICES of the Court of
KINGS BENCH, and formerly one of the JUSTICES
of the Court of COMMON BENCH:

OF SUCH

Select Cases,

As were Adjudged in the said Courts, during
the whole REIGN of the late King

JAMES:

*Collected and written in French by Himself; Revised
and Published in English,*

By Sir HAREBOTTLE GRIMSTON Baronet,
One of the Benchers of the Honourable Society of Lincolns-Inn.

With an Exact TABLE of the principal Points of the
LAW, Argued and Resolved therein.

*The Third Impression carefully Corrected, with the Addition
of many thousands of References never before Printed.*

LONDON,

Printed by W. Rawlins, S. Roycroft, and H. Sawbridge,
Assigns of Richard and Edward Atkins Esquires.

And are to be Sold by H. Twysford, Fr. Tyton, H. Herringman,
T. Bassett, J. Wright, S. Heyrick, M. Pitt, C. Wilkinson, T. Dring,
C. Harper, T. Sawbridge, J. Place, G. Collins. 1683.

ADAMS 92112

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TO THE
STUDENTS
OF THE
COMMON LAWS
OF
ENGLAND.



When I had finished the former Part of the Reports of this Reverend Judge, collected by him in the first Sixteen years of the late King *Charles*, I did oblige my self by promise, That if God should bless me with health, I would imploy it in fitting the rest of his Reports for publique use. But were I not under such an Engagement, a Debtor to my Country, and in particular to the Professors of our Law; the meer merit of the action would sufficiently have encouraged me to it: For, wherein could I better have spent my time, or more observed that rule of the Apostle, of *seeking not my own only, but of others good*, than in uncaising this Jewel, and

com-
Pref. 1. Cr.
10. 2.

THE EPISTLE.

communicating to Posterity so great, though hitherto a hidden treasure of Law and Learning? Besides this, which was enough to excite, I had another reason, that did sweeten my labours herein; And that was, that pleasure I took in recollecting these curious Pieces, and through them viewing the most lively Image of a Person, whose Piety, Knowledge, and Vertues had made him as much admired by others, as his relation had endeared him to my self; so that I could not in justice to his Memory, suppress any longer this Monument of his Fame. Sure, it is a blessing promised to every good man, *That his Works shall praise him in the Gates*: Of which nature, I taking this to be one, it was but my duty to publish it.

To those who have had a taste of this worthy and eminent Judge's great abilities, of his Reports formerly Printed, I need not further recommend these, then by saying only, that they are of the same Piece, and drawn by the same hand; but with so much exactness and perfection of skill, that in the first, though he hath surpassed many others, yet in these he seems to surpass himself. And therefore, I have been more than ordinarily careful in the Edition, that the Reverend Reporter may not be blemished with those many *Errata's* in this, which have somewhat obscured the former; Especially in the latter Edition of it, by some ignorant and mercenary persons, who care not how they blur mens Credits, and therein wrong the Reader, as well as the Learned and Judicious Reporter, so they may have

THE EPISTLE.

have a vendible Impression. To prevent all gross and fatal mistakes, I have perused every sheet, and exactly examined the same by the Original under his own hand: Which as it did very much retard the Impression, so I hope the Correctiveness of the Work will abundantly satisfy for the delay of it; And those Errors which have escaped in the Printing of these Reports, are such, as an easy Judgment may *in transitu* rectify; however you will find them particularly corrected, in the usual place, after the end of this Book.

There still remains another Part of this Learned Judge's Reports, collected by him from the 23. Year to the end of Queen *Elizabeth*; which I intend to publish, if God be pleased to lend life and health: And so shall once more have occasion to mention his Name, whose Merits and Memory cannot too thankfully be recorded; And I am sure, I may err sooner in the defect of his praise, than the excess: For he died full of commendation for Wisdom and Piety; and left such a stock of Reputation behind him, as might kindle a generous emulation in Strangers, and preserve a noble ambition in those of his Name and Family, to perform actions worthy of their Ancestors. *Valete.*

HAR. GRIMSTON.

WE all, knowing the great Learning,
Wisdom, and Integrity of the Author,
do (for the Common benefit) approve and allow
the publishing of this Book, in the same Letter as
now it is printed.

Jo. Glynne,
Oliver St. John,
Edward Atkins,
Robert Nicholas,
Matthew Hale,
Hugh Wyndham,
P. VVarburton,
Jo. Parker.

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Termino Paschæ

Anno primo

J A C O B I

R E G I S

In Banco Regis.

IN this Term fourteen Serjeants at Law were made, viz. *John Croke*, Knight, Recorder of London, *Thomas Coventry*, Laurence Tansfield, *Thomas Foster*, and *Robert Barker* of the Inner-Temple; *John Sherley*, *George Snig*, *Edward Philips*, and *Augustine Nichols* of the Middle-Temple; *Robert Houghton*, *Thomas Harris*, and *H. Hobert* of Lincoln's-Inn; *James Altham* and *Richard Hutton* of Grayes-Inn. They all besides *Sherley*, *Snig* and *Hutton*, had received their Serjeants Writs in Hillar. Term 45 Eliz. retournable *Tres Pasch.* following, before which time by the Queens Demise all the said Writs were abated; and new Writs were awarded under the name of the now King, retournable the same *Tres Pasch.* And three other Writs were afterward directed to the said *Sherley*, *Snig* and *Hutton*, retournable the same day, who appeared in Chancery the Tuesday following, *Post Tres Pasch.* At which day the said *John Croke*, because he had been Speaker of the Parliament, (and thereby had gained place of all other Counsellors, not being Serjeants before) by direction from the Lord-Keeper appeared as Ancient, although he was *puisne* in admittance to five of them; and he made a Speech in all their names, and delivered unto the Lord-Keeper a Ring for the King, and then they there severally took their Oaths; after which a day was prefixed them, viz. upon Tuesday, *post menssem Pasch.* to be at the Common Bench, to have the solemnity of the degree there performed; at which day, *Philips*, because he had received the Kings Patent to be of his Serjeants, came first, as ancient Serjeant; And the said *John Croke* (notwithstanding he had been Speaker of the Parliament, and notwithstanding he was Knighted the Sunday before) by the Appointment of *Popham* Chief Justice, with the Assent of

(1)

B

the

1 Cr. 4.
Co. 10. 99.

the greater part of the Justices and Barons, (against the opinion of the Lord-Keeper, and twelve of the Privy-Council, who writ their Letters, that he ought to have the precedence before the other Serjeants, notwithstanding their Antiquity of Admittance; and the opinion of *Anderson, Gawdy, Fenner* and *Felverton*, who concurred with the Lord-Keeper) was brought to the Bar after the said five new Serjeants, who were his Ancients in Admittance, and so to hold his place. And every of them after they came to the Bar, had several Writs and Counts, which Counts they Recited; there then being the Lord-Keeper, Lord-Treasurer, and all the Justices of both Benches, and Barons of the Exchequer; and after their Count recited, and Writs read by the Prothonotary, one of the ancient Serjeants imparled thereto, and then placed them in their places; one of their friends being a Benchers, delivers in Court the Rings for them to all the Judges, Serjeants, and Officers there.

Termino

Termino Paschæ

Anno primo JACOBI Regis in Banco Regis.

Weaver *versus* Francis Clifford Pasch. 44 Eliz. &c.

DE B T: Upon an Escape against the Defendant, Sheriff of Yorkshire, and demands 240 l. for that one William Carr, and others were indebted unto him by a Reconusance acknowledged in Chancery in 240 l. whereupon he sued a special Scir. fac. in Chancery, and had Judgment by default, after two nibils returned, and an Elegit sued, which being returned nihil, he pursued a capias ad satisfaciendum, and thereupon the said William Carr was taken in Execution apud Ebor. and afterward let at large at London, the Plaintiff not being satisfied: per quod Actio accrevit, and upon this Declaration the Defendant demurred in Law. Godfrey for the Plaintiff moved, that this Execution is good, by a capias ad satisfaciendum, although it be in Chancery upon a Reconusance where no capias lies at the first; and so it hath been the course always there used, which is to be allowed: For the course of every Court is to be observed, 11 H. 7. 15. 48 Edw. 3. 13. Dyer 306. Puttenham. And although the granting of the capias be Error, yet the Sheriff is not to take advantage thereof, but it is good against him, and he is chargeable for the escape: and he shall be excused by reason thereof in false imprisonment, although the process were Erronious; for he is not to examine it, 21 Edw. 4. 27. 3 Edw. 6. 67. 36 Hen. 8. Dyer 60. 14 Hen. 4. 34. 20 Hen. 6. 36. and upon this reason 36 Eliz. it was adjudged accordingly in the Erchequer-Chamber, betwixt Ognel and Paston, That debt lies upon such an escape, the party being arrested by capias, upon a Reconusance, admitting the process to be Erroneous: and of that opinion was the Court here; but gave day over to be advised.

(2)
Yelv. 42.1
1 Rol. 809.

3 Cr. 164;
Post. 450.

1 Cr. 528.

Post. 280. 289.
Dier 67.
Hob. 202.
Moor 143.
Co. 6. 54. 2.

Co. 8. 142. 2.
3 Cr. 165.

Yare *versus* Gough.

(3)
Moor 680.
Yelv. 33.

Post. 394.
Co. 5. 9. b.
1 Cr. 227. 167.

UPon Demurrer, The Case was, That the Defendant being indebted to Cooper, who died intestate, Administration of his goods was committed to J.S. who brought debt, and had Judgment, and died before Execution; And the administration of the goods of Cooper the first intestate was committed to the Plaintiff, who took a Scir. fac. upon that Judgment comprehending all this matter: And it was thereupon demurred, whether it lay or no. And Gawdy Justice held, That it well lay; For the duty remaining is as a debt to the intestate, and being recovered, continued with him in that nature: and being turned into a Judgment, the second Administrator shall have a special Scir. fac. to execute it. But the other three Justices held, That the Action was determined, and he cannot have a Scir. fac. for default of pivity, and therefore is put to begin again. Wherefore it was adjudged accordingly, Unless, &c. 26 Hen. 8. 7.

Chandelor *versus* Lopus, in the Exchequer-Chamber.

(4)
Yelv. 20.

Post. 469.

Action upon the case: Whereas the Defendant being a Goldsmith, and having skill in Jewels and precious Stones had a Stone which he affirmed to Lopus to be a Bezars stone, and sold it unto him for a 100 l. ubi revera it was not a Bezars stone. The Defendant pleaded not Guilty, After Verdict and Judgment for the Plaintiff in the Kings Bench, Error was thereof brought in the Exchequer-Chamber; Because the Declaration contains not matter sufficient to charge the Defendant, viz. That he warranted it to be a Bezar stone, or that he knew that it was not a Bezar stone, for it may be, he himself was ignorant whether it were a Bezar stone or not. And all the Justices and Barons (besides Anderson) held, that for this cause it was Error: For the bare affirmation that it was a Bezar stone, without warranting it to be so, is no cause of Action; And although he knew it to be no Bezar stone, it is not material. For every one, in selling of his Wares, will affirm that his Wares are good, or the horse which he sells is sound, yet if he warrants them not, to be so, it is no cause of Action, and the warranty ought to be made at the same time of the Sale, As Fitzh. N. B. 94. c. & 98. b. 5 H. 7. 41. 9 H. 6. 53. 12 H. 4. 1. 42 Aff. 8. 7 Hen. 4. 15. Wherefore forasmuch as no warranty is alledged, they held the Declaration to be ill. But Anderson to the contrary; for the Deceit in Selling it for a Bezar, whereas it was not so, is cause of Action. But notwithstanding it was adjudged to be no cause, and the Judgment was reversed.

Rew *versus* Long, in the Exchequer-Chamber,
Mich. 42 & 43 Eliz. Rot. 335.

ERror in the Exchequer-Chamber of a Judgment in an Ejecti-
one firmæ: The Error assigned, for that the Plaintiff was an
Infant at the time of the Bill purchased, and sued by Attorney,
where he could not make an Attorney, but ought to have sued by
Guardian; And all the Justices and Barons held it to be Erro-
neous for this cause, and to be an Error *in Fact*, and might be well
assigned for Error in this Court. Although it were alledged, that
their Authority given them by the Statute was not to examine
matters *in Fact*, but only Errors in Law, which appeared of Re-
cord, and to affirm or reverse the Judgment. But notwithstanding
they all (besides Anderson) held, that it might be assigned: where-
fore the Defendant in the Writ of Error said, that he was of full
age at the time of the Bill brought, and thereupon they were at
issue, and Nisi prius awarded for the Trial thereof, before Periam
Chief Baron, and Fenner one of the Justices of the Kings Bench.
And for this cause it was moved to be ill, but they held it to be
well enough, and that he might be Justice of Nisi prius to try the
Error *in Fact* of his own Judgment. It was also moved, that this
Trial was ill, because this writ of Nisi prius issued under the Ex-
chequer-Seal, in regard that Anderson Chief Justice of the Com-
mon Bench, who had the Seal of that Court, refused to seal it.
But they held it to be good enough, for that it is not examinable
under what Seal this writ issued, wherefore the issue being found
for the Plaintiff in the Writ of Error, That the Plaintiff in
the first action was within age at the time of the Bill exhibited,
they reversed the Judgment, and remanded the Record: And it
was afterward moved in the Kings Bench, That they had proceed-
ed in the Exchequer-Chamber without warrant of the Statute to
Try Error *in Fact*; For the Statute doth impower them only to
examine Errors in the Record; and of that opinion were all the
Justices: wherefore for this cause They would not regrant resti-
tution upon this Judgment to the Defendant, who was put out by
the first Judgment.

(5)
1 Cr. 514.

Post. 10.

1 Cr. 514.
Hob. 5.
27 El. cap. 8.

Coxe *versus* Cropwell, in the Exchequer-Chamber,
Hill. 44 Eliz. Rot. 709.

ERror of a Judgment in the Kings Bench, in an Action of
Trove against Baron and Feme, because the Feme after
Coverture found goods, and converted them to her Use; They
pleaded Quod ipsi non sunt culpabiles. And for this Cause it
was ruled to be ill; For that no Tort is supposed in the Ba-
ron,

(6)
3 Cr. 883.
Post. 661.
1 Cr. 495.
Post. 530.
1 Cr. 254.

ron, and so ought to have pleaded *Quod ipsa non est inde culpabilis*. Wherefore, after verdict for the Plaintiff a Repleader was awarded, whereupon they repleaded and traversed the conversion, and it was found for the Plaintiff, and Judgment accordingly, And Error assigned that the first Issue was well joyned, and there ought not to have been a Repleader, Sed non allocatur. For the Tort being alledged to be in the Feme, and none in the Baron, the Issue shall be only that she is not Guilty; And so the Prothonotaries of the Common Bench certified to be their course. Another Error was assigned, Ore tenus. That the Judgment to replead was not good, for it is *Quia videtur curiæ quod placitum prædictum, & exitum superinde junctum, est minus sufficiens in Lege, ideo dictum est partibus quod replacitent*. Which is not any Judgment, for it ought to have been, Ideo consideratum est, &c. Sed non allocatur. For it is a sufficient award to replead, and the course is so altogether; wherefore, rule was given to affirm the Judgment. But it was afterward informed to the Justices and Barons that there was not any Bail entered for the Feme, and the Action was principally against her, wherefore the Judgment was erroneous, and a Certiorari prayed to certify it. But it was moved, that in regard he had assigned his Errors, and had not assigned that for Error, And the Defendant had pleaded in nullo est Erratum, and the Record is examined, he may not now alledge it, for then it would be infinite, especially to reverse a Record, but peradventure to help a Record, in affirmance of a Judgment, they may award a Certiorari ex officio, upon suggestion, that there is Diminution: But the Justices held, that although the Party, after in nullo est Erratum pleaded, is not receivable to alledge such a thing for Error, which did not appear in the Record certified, yet to inform the Court, he may move them, and they ex officio may award such a Certiorari, if they will. Whereupon they awarded a Certiorari, And the Bail certified to be well entered, and the Judgment was affirmed.

† Cr. 417.
Hob. 126.
Post. 239.

Post. 386.

Post. 277.
Post. 542.

3 Cr. 153.
1 Cr. 351.
Post. 141.

Martin *versus* David Boure, in the Exchequer-Chamber, Pasch. 44 Eliz. Rot. 393.

(7)

A Sumpfit: Whereas Nicholas Saltar was indebted to Alexander Harris being at Aleppo in Spain for 283 l. 6 s. 8 d. amounting unto 1326 Dollars called Royals of eight, monetæ Hispaniæ; And Alexander Harris agreed with the Defendant, That Nicholas Saltar should pay unto him that 283 l. 6 s. 8 d. in England, And that the Defendant should pay unto him the value of that money at Aleppo in Spain, and thereupon deliver to the Defendant a Bill of Exchange, requiring N. S. to pay that money accordingly, in consideration that the Plaintiff at the Defendants request would deliver that Bill to the said N. S. and receive of him the said 283 l. 6 s. 8 d. And in consideration that

Post. 307.

the

the Plaintiff would deliver to the said N. S. a Bill of Exchange signed with his hand, Secundum usum Mercatorum, requiring the Defendant to pay to the said A. H. the value of that 283 l. 6 s. 8 d. in Spanish money at Aleppo: And in consideration that the Plaintiff would assume to the said N. S. that the Defendant should pay to the said A. H. the value of the 283 l. 6 s. 8 d. in Spanish money at Aleppo according to the said Bill, the Defendant assumed that he would pay to the said A. H. the value of the said 283 l. 6 s. 8 d. in Spanish money at Aleppo, prout by the said Bill of Exchange by the Plaintiff to be made should be appointed, and alledgeth in fact, that he delivered to the said N. S. the said Bill of A. H. and received from him 283 l. 6 s. 8 d. to the Defendants use, and delivered unto him a Bill, signed with his hand directed to the Defendant, requesting him to pay to the A. H. at Aleppo 1326 Dollars, called Royals of eight, monetæ Hispaniæ; And that the Plaintiff assumed to the said N. S. that he the Defendant would pay to the said A. S. the said 1326 Dollars, called Royals of eight, monetæ Hispaniæ, according to the said Bill: And that the Defendant had not paid them, &c. The Defendant pleaded, Non Assumpsit, and it was found against him, to the Plaintiffs Damage of 300 l. and Judgment accordingly, And Error thereof brought in the Exchequer-Chamber, and assigned. First, Because the considerations are Executorie, which ought to be precisely alledged to be performed according to the agreement, and they are not performed according to the agreement; first, because he ought to have given a Bill of Exchange, signed with his hand, Secundum usum Mercatorum; And if it be not so, he is not bound to pay it, because it varies from his agreement. Secondly, because his Assumpsit is, that if he gives his Bill directed to the Defendant to pay the value of 283 l. 6 s. 8 d. in Spanish money, &c. and assume that the Defendant shall pay that value of 283 l. 6 s. 8 d. in Spanish money, &c. That he will pay it: And he doth not pursue this agreement: For he gives his Bill to pay 1326 Dollars, called Royals of eight, which is not according to the agreement; For he thereby ties himself to pay that kind of money, and not generally, the value of 283 l. 6 s. 8 d. and so it varies from the agreement, which he is not bound to perform; As if the promise had been, that if he gave his Bill, That I shall pay the value of 100 l. in English money, I will pay, &c. and he gives his Bill that I shall pay the 100 l. in Spur-Royals, I am not bound to perform it; For where I have election to pay it in any money, he ties me to pay it in that kind of money only, so as he takes from me my election in what money I will pay it, and makes me peradventure to be at the charge of exchanging it into that money. Sed non allocatur, because it is averred, that 1326 Dollars, &c. to be of the value of 283 l. 6 s. 8 d. Therefore it is all one, and shall not be intended that the payment of them
in

in other money should be prejudicial unto him ; wherefore without hearing any argument or greater deliberation, the Judgment was affirmed. Note these Exceptions were not moved in the Kings Bench.

Lovelace versus Wilcocks, Hill. 44 Eliz. Rot. 802.

- (8) **E**Rror in the Kings Bench of a Judgment in the Common Bench, the Error assigned was for that in Replevin of the taking, &c. Apud Kingsdown. The Defendant avowed, for that the place where, was holden of him as of his Manor of Kingsdown in the County of Kent. The issue was upon the Tenure and the veni. fac. was de vicineto de Kingsdown. But it ought to have been also de vicineto Manerii de Kingsdown, For it shall be intended two places and not one ; nor that the Manor is in the same Vill : and then the *Visne*, ought to be of both ; and of that opinion was all the Court, wherefore the Judgment was reversed.

Yelv. 26.
1 Cr. 480.
Post. 86. 303.
Post. 405.
Hob. 285.

- (9) **N**ote, *Popham* cited a Case to be resolved by all the Justices, Anno 16 Eliz. betwixt *Sydenham* and *Keilaway*, that where two conspire to indict one falsely, and the Party is not indicted, because the Jury had not sufficient Evidence, but returned an *Ignoramus* upon the Bill, no conspiracy lies, because he never was indicted nor acquitted, yet he may be indicted upon conspiracy at the Common Law, for this false conspiracy and misdemeanor, which is punishable at the Common Law ; so if any commit Perjury, which is not punishable by the Statute of 5 Eliz. yet he may well be indicted thereof and punished by Fine and Imprisonment.

Post. 490.

Philips versus Echard, Trin. 44 Eliz. Rot. 463.

- (10) **D**Ebt upon an obligation of 300 l. against the Defendant, as Executor of *Elinor Echard*, the Defendant pleads that his Testatrix was bound in a Statute of 300 l. to Paul Banning, and that he had but 80 l. of the Goods of the Testatrix to satisfy that Statute, which remained yet in its force, and not paid, Et hoc, &c. And it was hereupon demurred, and argued by *Tanfield* for the Plaintiff, and by *Stephens* for the Defendant. *Gawdy* and *Yelverton* held that it was not any Plea, because it is not averred that the Statute was made for Debt, and that the Debt is not satisfied. For if it were made for the performance of Covenants, it is not reason it should be a bar in Debt upon an obligation which is already due ; And peradventure the Covenants shall never be broken, so as there never shall be any cause of Suit or Extent thereupon. But if it had been made for a true Debt, it being a Debt of Record, ought to be satisfied before an obligation, as 21 Ed. 4. 21. 6 Ed. 4. 12. 6 Ed. 6.

Post. 102. 131.

Dyer

Dyer 80. Trewiniards Case, 28 Hen. 8. Dyer 32. & 6 Eliz. Dyer 232. That Debt upon a record shall be paid before an obligation, and a Debt upon an obligation which is put in Suit, before an other obligation. And in regard it lieth in the Defendants notice, for what causes that Statute was made, and not in the Plaintiffs knowledge, who is stranger thereto, therefore the Defendant on his part ought to shew it to excuse himself; otherwise it would be a great inconvenience to those to whom Debts are due, to compel them to take knowledge of all Statutes, and for what causes they be made: And no Debt should be paid by an Executor, if Statutes made for the performance of Covenants (and no Covenant shewn to be broken) should be a barr to due Debts. Wherefore this plea without such averment is not good: But Fenner held, that the plea was good; for when it is averred that the Statute is in its force, and the sum due thereupon not paid, It is to be intended to be a Statute for debt, until the contrary be shewn; which lies on the other party to shew. And he with Gawdy and Yelverton agreed, that a Statute for performance of Covenants (none of them being broken) is no barr in debt upon an Obligation. And they all held, that if an Executor pay debts upon Obligation before a Statute be broken, and afterwards a Covenant is broken, whereby Suit is upon that Statute, payment of the debt upon the Obligation, and that he hath no more in his hands of the Testators goods, then to satisfy the Recovery in debt upon the Obligation, is a good barr against the Statute. *Adjournatur*, absente Popham.

Co. 5. 28. b.
1 Cr. 363.
Moor 752.

Post. 35.

Swetman *versus* Cush, Hill. 44 Eliz. Rot. 485.

Ejectione firmæ. Upon an especial Verdict the Case was, a Lease for 80 years was made upon condition, if the Lessee, his Executors or Assigns did not repair the house within six months after notice and warning given, that the Lease should be void. The Lessee makes a Lease for 10 years, the Assignee of the reversion comes to the Tenement, and gives notice to Wilmere (occupier of the houses under the Lessee for ten years) That the house was defective in reparations, and shews wherein; And because it was not repaired within six months after, he entered, and let to the Plaintiff; whereupon the Defendant as servant to the Lessee re-entered, Et si super, &c. And after argument at the Bar, Popham, Fenner, and Yelverton held, That this notice to a person who is not interested in the term, although it was upon the Land, is not sufficient: for he is bound under the pain of forfeiture to repair it after notice; and therefore Popham said, if a Lease be made reserving Rent, and if the Rent be not paid upon demand at any time within the year, that the Lease shall be void: If the Lessor demand it upon the Land at any time

(11)
Moor 680.
Yelv. 36.

Moor 680.
Yelv. 37.

Yelv. 37.

time of the year, but the last day thereof, the Lessee not being there it is a void Demand: So if he meet the Lessee at any time out of the Land, and demand his Rent, it is a void Demand also; But his way is to appoint the Lessee, that such a day he will be upon the Land, and demand his Rent, and then if the Lessee be not there, to pay it upon his demand, the Lease is forfeited: So here the notice of the Land not being given to the right person is void. Wherefore absente Gawdy, It was adjudged accordingly.

Bray versus Grobe.

(12)
Ante 5.

Error of a Judgment in Trespass, for that the Defendant being an Infant, appeared by his Attorney, and not by his Guardian. The Defendant in the Writ of Error pleads in nullo est Erratum. And adjudged to be Error, and for that cause reversed.

Wade versus Atkinson, in the Exchequer-Chamber.

(13)
Post. 89.

Error in the Exchequer-Chamber of a Judgment in the Kings Bench, the Error assigned was, because in Debt against him as Administrator, he doth not shew by whom, nor by what Authority the Administration was committed, and in proof thereof he relied upon 28 Hen. 6. 6. and Book of Entries 301. where it is shewn by whom the Administration was committed: And the Prothonotary of the Common Bench certified, that the course is to say, Cui administratio commissa est, by such, &c. whereto it was said, there is not any question but that such a Declaration against an Administrator, shewing by what authority the administration was committed unto him, is good; And if this clause were omitted, it is well enough, for there is not any reason the Plaintiff should be enforced to shew by what authority the Administration is committed, whereof peradventure he hath not any consuance. But the Justices and Barons held it to be erroneous; For as well as he takes consuance that he is Administrator, so he may take consuance by whose means he is made Administrator. For otherwise he may charge him as Executor *de son tort demesne*, if he be not Administrator. Wherefore Judgment was reversed.

Foster versus Clement.

(14)

Error of a Judgment in an Assumpsit in the Common Bench, for that the Plaintiff declares, whereas he was obliged in an obligation of 300 l. The Defendant assumed to save him harmless, &c. And although he were impleaded upon that Bond by the Obligee, and recovery had per debitam legis formam,

mam & licet sæpius requisitus. That the Defendant had not saved him harmless, &c. The Defendant pleaded concord, and found against him, and Judgment against him, and now assigned for Error that the Declaration was not good, because it is not allowed how he impleaded him, and recovered, but generally implacitasset & recuperasset. Sed non allocatur; for that is sufficient without shewing the whole Record. Post. 46.

Arundel versus Arundel.

ERror to reverse a Fine levied Hillar. 21 Eliz. The first Error assigned was, because the writ of Covenant bare teste 2. Januarij 21 Eliz. returnable Octab. Hillar. 21 Eliz. and the Dedimus potestatem bare teste 3. Januar. 21 Eliz. and mentioned, Quod cum breve de conventiono pender, which is not so, because it cannot be said, quod pender until the return thereof, and therefore erroneous. Sed non allocatur; for it may be well said to be pendant immediately after the purchase thereof. A second Error assigned was, for that the writ of Covenant, and Dedimus potestatem are, that a Fine shall be de Manerio de P. and twenty acres of Land, and 40 s. redditus in P. and the concord of the Fine is, Quod recognovit Manerium & Tenementum prædicta cum pertinentiis esse Jus, &c. omitting the Rent; so it varies from the writ and the warrant of the Dedimus. Sed non allocatur; for as Popham said, the usual course of the Fine-office is, when a Fine is levied of a Manor and Rent, if the Rent be under the value of five pound, they never use to make mention thereof in the Fine; but if the Rent amount to 5 l. or more, then they use to mention it in the concord of the Fine; and therefore this Error assigned was disallowed. A third Error was moved, because the Dedimus potestatem was made per Rogerum Manwood militem: And Roger Manwood who took this Fine was not then a Knight, (for in truth this consuance was taken by Roger Manwood in the Circuit in Lent-vacation, and at that time he was not made Knight, but was only one of the Justices of the Common Bench; but afterward upon the death of Jefferies, (who was chief Baron) Roger Manwood was made chief Baron and Knighted;) and for this cause it was said, that the said writ was not any warrant unto him to take this Consuance, wherefore the fine being taken by one who was not Knight, as is confessed by the pleading, (for by pleading in nullo est erratum, this matter in *Fait* is confessed) it is therefore Error. But it was thereto answered, that this is an Error directly against the Record, and therefore not receivable; for the Record upon the Dedimus potestatem, is responsio infra nominati Rogeri Manwood and his name subscribed, which is intended the same Roger Manwood to whom the writ is directed; and it is against the Record to say the contrary: also in the Entry of the Queens

(15)

3 Cr. 677.

1 Rol. 757.

Yelv. 33.

Co. 4. 47. b.

3 Cr. 677.

Post. 699.

1 Rol. 751.

Yelv. 33.

Dier 89. b.

Post. 359.

1 Cr. 53.

silver, the Record is, habet pacem admissam coram Rogero Manwood milite; so to aver that he who took the Conuſance was no Knight, is expressly against the Record, and against that which he did as Judge, which is not receivable: And of that opinion was all the Court, who all agreed, and severally delivered their Opinions openly, that for this cause such an Error might not be assigned expressly against that which he did as a Judge, and against that which is recorded: and as he may not say, *nul tiel Rogerus Manwood unques in rerum natura*, or that Roger Manwood did not take that Conuſance, so he cannot say but that he was a Knight: For it is recorded as a Fine taken by him; and as prim. Mariæ Dyer in Verney's Case, An Error was not suffered to be assigned that the Conuſor was dead before the time of the Conuſance certified to be taken, Because it is expressly against the Judges Certificate: And 5 Mar. Dyer 163. when a Record of Nisi prius was certified in the name of a Justice of Assize, It cannot be assigned for Error that the Judge was dead before, For it is against the Record, and against that which was done Judicially: So here, to aver against that which is returned on Record, is not receivable. And if it should, great inconvenience would ensue, as well to draw in question by such averment, this Fine, which was levied twenty years since, as also to question any Fine which was levied an hundred years past, upon such a pretence, which is not sufferable. And therefore Popham said, There was a great difference betwixt Acts Ministerial and Acts Judicial: For against Acts which a Sheriff or any other Officer doth as Ministerial, an Averment may be: but not against that which is done Judicially, and by one as Judge. Vide 7 H.7.4. & N. B. 23. And whereas it was said, that by *In nullo est Erratum* pleaded, the matter indeed is confessed, That is not so: But it is quasi a Demurrer upon the Error assigned, that it is not receivable, as it hath been adjudged that where an Error hath been assigned, Because the Record was that he appeared per J. S. Attornatum suum, whereas there was not any such J. S. in rerum natura, *In nullo est Erratum* being pleaded thereto, It was held that it was not an Error to be assigned, and that the Plea was good: For a Demurrer in Law is never a confession of a thing against the Record, but only of that which may stand with the Record; For otherwise his confession would be vain, and should not bind the Court: Wherefore the Fine was affirmed.

Dier 89. b.
3 Cr. 469.

Post. 29.

Post. 521.
2 Cr. 53.

Gervase Molineux *versus* Lacon, Hill. 44 Eliz. Rot. 409.

(16)
Yelv. 55.

SCire facias was brought in Chancery upon a Reconuſance there, and the parties there being at Issue, the Record was sent hither to be tried, and being tried and found for the Plain. tiff, he had Judgment, and an Elegit here returnable; where-
upon

upon divers lands were extended and offered by the Sheriff to be delivered to the party according to the Extent; which the Plaintiff refused before the Sheriff, because they were too high, and prayed that the Extendors might return them: and the Sheriff returned all this matter: and at the day of the return of the Writ, the Plaintiff came hither and prayed that the Extendors might retain the Lands, and that he might have execution of their lands according to the Statute of Acton Burnel, and whether he should have it or no, was much debated, And a Case was shewn ex libr. Bendlow. 4 & 5 Phil. & Mariae. Wherein it is set down to be resolved by all the Justices, that upon an execution upon a reconu-
Co. Lit. 290. a.
 sance for debt, if the land be extended too high, the Plaintiff may pray that the Extendors may retain it, &c. as well as upon an extent upon a Statute Merchant or Staple. And that it is within the Equity of the Statute of Acton Burnel: But in a Scir. fac. upon Bail, and Recovery and Execution thereupon, it is otherwise; and of that opinion were all the Court here. And that the Plaintiff had time enough upon the return of the Writ to pray it, wherefore it was awarded that the Extendors should have the land at that Rate, and that they should pay the debt, 21 Ed. 3. 21. Plowd. Comment. 82.

Philips versus Rice Hugre.

ERror of a Judgment in audita querela in the Common Bench upon the Statute of 300 l. wherein Hugre made his
(17)
3 Cr. 754.
Yelv. 38.
 surmise, that there was an Indenture of defeasance, if he paid annually for six years 50 l. to one John Bush at the Feast of St. Michael at such a place in S. that the Statute should be void, and averred the Statute to be made to the use of the said John Bush, and that he tendred at every of the said Feasts the said 50 l. at the said place, and that John Bush was not there to demand or to receive it: The Defendant pleads protestando, That the Plaintiff non obtulit at every of the said Feasts, &c. Pro placito idem John Bush dicit Quod ipse at such a Feast was there to receive it, and none was there to pay it absque hoc, That he tendred it at the said day, &c. And thereupon the Plaintiff demurred, and shewed for cause, for that the Defendant said, he was there ready to receive it, which was contrary to that which the Plaintiff affirmed, and so he ought to have concluded his Plea, Et de hoc ponit se super patriam, and not with a Travers. And after Argument, for that the Plea of the Defendant was no Plea (for it was pro placito idem John Bush dicit, where it ought to have been Idem Riccius dicit. So there is no Plea at all for the Defendant, but by a Stranger, Therefore) it was adjudged for the Plaintiff, That he should be discharged of the Execution; and hereupon Error was brought and assigned, for that these words Idem Johannes Bush were void words, and are well amendable, and that the
3 Cr. 755.
 Plaintiff

Yelv. 38.
 Post. 354. 396.
 587.
 1 Cr. 32. 593.
 Post. 67.
 Post. 372. 445.

Plaintiff had not assigned it for cause of Demurrer, &c. But the Court resolved that it was not amendable, because it is the substance of the Plea, and not the mispicion of a word only: So as there is not any Plea at all. Secondly, It was resolved here, that although John Bush was a stranger to the reconuſance, yet ſoſmuch as it is averred to be made to his uſe, he ought at his peril to be ready at the place every day to receive it: Otherwiſe, the reconuſance is not forfeited when the other doth not tender it. Thirdly, the ſuſmiſe that John Bush was not there to receive it, although he doth not ſay that he nec aliquis alius ex parte ſua was there to receive it, is good enough; For it ought to come on the other part, if any other were there to receive it. Fourthly, whereas he ſhews, that he at one of the days was ready and offered to pay it, and the ſaid John Bush was not there ad exigendum & recipiendum (ſo the copulative Et made the demand material, which needed not) yet the ſuſmiſe was good. For the matter is, whether he tendered or not; wherefore notwithstanding theſe exceptions the judgment was affirmed.

3 Cr. 755.
 Poſt. 71.

(18)

Memorandum, It was resolved this Term upon conference with all the Juſtices and Barons at Serjeants-Inn, that Informations exhibited for the Queen her ſelf, as of *Intruſion*, or upon any Statute or otherwiſe, and Informations for the Queen and party upon any Penal Law, although the proceedings there have been to Iſſue or Verdict: yet they be all diſcontinued & *ſine die* by the Queens Demiſe: But the Informations themſelves remain as a record for the King, and new Proceſs may be awarded thereupon to compel the parties to answer thereto *de novo*: and ſo it is of Informations for the Queen and party; the Information it ſelf ſhall ſtand, but all proceedings thereupon are determined. Nor be they holpen by the Statute of 1 *Ed. 6. cap. 7.* But if they ſhould be altogether determined then, peradventure the Action were utterly loſt, becauſe the time wherein it ought to be purſued is expired: Therefore to avoid that miſchief, the Law hath been taken to be, that the Information it ſelf ſhall ſtand: and ſo hath the practice been in the Exchequer and Kings Bench, as appears by the Preſidents of both Courts, the Records whereof they had cauſed to be ſearched: So it is of Endiſments wherein the proceedings have been to iſſue, or depend in Proceſs, and although the Iſſue in them be tried, no Judgment being given thereupon (unleſs it be in caſe of Treason or Felony, which being tried ſhall be aided by the Statute of 1 *Ed. 6.*) All proceedings in them are determined: But the Endiſments themſelves ſhall ſtand, and new Proceſs be awarded, and the parties answer and plead *de novo*. But an original Writ brought by the Queen, as a *Quare Impedit*, or the like, ſhall abate utterly by the Queens Demiſe, becauſe the Action is brought in her name only: And it cannot be ſued by the now King, the Writ being abated.

Moor 748.
 1 Cr. 10.
 Co. 7. 30: b.

Co. 7. 31. a.

Co. 7. 31. a.

Co. 7. 31. a.

Drury *versus* Kent, Hill. 45 Eliz. Rot. 113.

REplevin upon a special Verdict. The case was such, A man ⁽¹⁹⁾
prescribes to have common appurtenant to the Mannor of ^{1 Rol. 402.}
B. for all his beasts Levant and Couchant upon it: He grants this
Common to A. Whether this grant were good or no, was the
Question; And adjudged, that he could not grant it over, for he
hath it Quasi Sub modo, viz. For the beasts Levant, &c. No more
then Estovers to be burnt in an house certain: But common ap-
purtenant for beasts certain may be granted over. Therefore it
was adjudged, ut supra.

Robinson *versus* Robinson.

DEbt as Executor of J. S. The Defendant pleaded Quod ⁽²⁰⁾
^{Ante fact.} he brought an Action as Administrator of J. S. ^{Co. 5. 32. b.}
for this debt, and was therein barred, Judgment, *Si ceo Actio*
avera, and the truth was, that he and another were made Exe-
cutors, and he not knowing thereof, took Administration, and
brought Debt as Administrator, and it was pleaded in abatement,
that another was made Executor, who had proved the Will and
Administred. And upon this Plea he was barred: And now he ^{Post. 394.}
having proved the Will, and the other being dead, had brought
this Action as Executor, and the Defendant pleaded against him
the former Bar, and it was adjudged, that it was no Bar: for
although once a Bar in a personal Action is a Bar perpetual, That
is to be understood when it is a Bar to the Right; But here it
was not any Bar. But by the misconceiving of his Action, the ^{Co. 5. 33. a.}
Action abated: Therefore it is not any Bar in a new Action. And
it was adjudged accordingly.

Termino

Termino Trinitatis,

Anno primo J A C O B I Regis in Banco Regis.

(1)
32 H. 8. c. 21.

Post. 595.

Memorandum, That this Term the Justices sate upon the *Friday*, being the day of the Feast of *John Baptist*, although when it happens in any day of the Term besides the first day, it is no *Dies Juridicus*: But because it fell the next day after *Corpus Christi* day, and by the express words of the Statute, the Term is appointed to begin as a full Term the next day after *Corpus Christi* day. The Justices by the express words of the Statute are to sit the same day; and *Kemp* the Secondary said, that he knew it to happen once before in his time. And it was so resolved.

(2)
1 Cr. 11.

NOte, *Propter pestilentiam*, which greatly increased in *London* and *Westminster*, The Term was adjourned the day of *Octabis Trinitatis* unto *Tres Trinitatis* by Writ of Adjournment, and the Justices sate all the First day of *Octab. Trinitatis*, and upon the *Monday* which was the day of *Tres Trinitatis*, and so unto the end of the Term, which was *Die Mercurii*.

Termino

Termino Michaelis

Anno primo JACOBI Regis in Banco Regis,
apud Winton.

Memorandum, This Term (in regard of the great Plague (1) which was about London and Westminster) was adjourned until *Mense Michaelis* to Westminster. And at the same day was adjourned again unto *Crastino Martini* to Winton, and the first day of *Crastino* was *Dies Sabbati*, at which day the *Essoins* of the Kings Bench and Common Bench were kept; but nothing more done in any of the Courts, and but one Justice of every Bench sate, viz. *Yelverton* for the Kings Bench, and *Warberton* for the Common Bench. And upon Monday following, being the third day from the said return, *Popham* and *Yelverton* sate in the Kings Bench, and not any of the Justices of the Common Bench sate in that Court, because they conceived they were not to sit until the *quarto die post*. For all their process are returnable at the Common days; but in the Kings Bench, the process are returnable *de die in diem*. And in the Chancery, the Lord Chancellor sate upon the Monday. 1 Cr. 13. 1 Cr. 200.

The Lady Ruffels Case.

Endictment for the Lady Ruffel against divers Servants of the Lord Admiral upon the Statute of 8 H. 6. For that the late Queen by her Letters Patents under the great Seal reciting, whereas she had by her Letters Patents, Anno 23 Regni sui, granted to one Rich. Beak the office of the Custody of the Castle of Dunnington, with all profits thereto appertaining, and an Annual fee for the exercising thereof, *Habendum* for his life: and had granted unto her the reversion of that office for her life post mortem, Surrender, or Forfeiture, &c. That Richard Beak died such a day at H. in the County of Buck. and that she afterwards exercised that office, and the Defendant with force expelled her, and disseised her of that office, &c. Divers Exceptions were taken to this Endictment. First, because the Jury find the death of Beak in another County, which they ought not to do; for they ought not to find things done in another County, but it is void therein, and then the death of B. is not found, and so she hath not any title: And although they might have found his death without expressing any place, this finding as it is now is void. And to this opinion the Juries seemed to incline, but they gave not any resolution therein. Co. 8. 56. 57. Post. 55.

D

Secondly,

Secondly, for that a Feme cannot have this office of the custody of a Castle, because it appertains to the War, and is to be executed by men only. Sed non allocatur, Because it is granted unto her to be exercised per se vel Deputatum suum. And it doth not appear to be a Castle of War, but may be a private house. Thirdly, because the Endowment is, that the Queen, (reciting that she had granted it for life) granted the reversion thereof; And it is not averred, that the Queen granted it for life, otherwise the grant had not been good, and so no title shewn: And to that opinion all the Court inclined. Fourthly, that an Endowment upon the Statute of 8 H. 6. lies not for such an Office; But there ought to have been a Disseisin alledged of the Tenant of the Freehold of the House; But the Court delivered not any opinion therein: And the Case of the Lady Russell then appeared to be, that she having the office granted unto her of the custody of the Castle with all profits, &c. And the Lord Admiral having the Inheritance of the House granted unto him, The Lord Admiral sent his Servants with his Stuff to the House, intending to use the House, and the Lady Russells Servants denied them to enter, pretending that the Lady Russell was to have the use and disposing thereof during her life; which was alledged to be a forfeiture of the Office; And to that opinion inclined all the Court, if such a disturbance had been by the Lady Russells Servants at her command; but if the Servants did it on their own head, it is otherwise. And therefore Popham said, it was so resolved in the Case of the Lord Arundel for the custody of None-such House which was granted to Sir Edward Carden, who denied the Lord Arundel, who had the Inheritance, to come there to inhabit: And it was resolved to be a forfeiture.

Bosden versus Sir John Thinn.

(3)
Yelv. 40.

A Sumpsit; Whereas the Defendant requested the Plaintiff to give his credit for two Tun of Wine for one Roberts, to one Fludd, amounting to 50 l. he thereupon gave his Bond of 100 l. for the payment of that 50 l. and for the non-payment thereof was sued, and enforced to pay 70 l. and shewing this to the Defendant, That the Defendant in consideratione promissorum assumed unto him to pay the said 70 l. such a day, and he had not paid it, After non Assumpsit pleaded, and found for the Plaintiff: It was said, that this promise is not sufficient, in regard it is upon a consideration past. But the Court held, because Roberts upon the Plaintiffs undertaking at the Defendants request, had credit given him by Fludd; And that the Plaintiff was dam-

1 Cr. 409.
Hob. 104.
3 Cr. 715.
Dier 272. b.
Moor 866.

damniſſed by reaſon thereof, which in conſcience the Defendant ought to ſatiſſie: That the conſideration is ſufficient and not paſſed: Wherefore it was adjudged for the Plaintiff. Yelv. 44.
3 Cr. 42.

Sir Olive Leigh and Sir Matthew Brown
verſus Bargany.

TReſpaſs: For entring into their Lands, whereof they were Joyntenants, with a Continuando for divers days: The parties were at iſſue; Sir Matthew Brown was ſlain: It was moved, whether the entire Bill ſhould abate, or that the Action ſhould ſurvive: becauſe they were Joyntenants, and ſo the Treſpaſs to be puniſhed by the Surſivoꝝ. For if two Joyntenants be Defendants, and the one dies: It is clear that the Action is not gone; for the Action in it ſelf is joynt and ſederal; and ſo of an Abowpy in a Replevin, his death ſhall not abate the Action. But all the Court held, that in this Caſe the Action was gone: For on the Plaintiffs part if one die, all the Writ or Bill ſhall abate, unleſs it be in caſe of neceſſity, as in a Quare Impedit, where the ſix months peradventure might be paſſed, ſo as if the Bill ſhould abate; the Action failed: So of Audita querela by two; The death of the one ſhall not abate the ſuit, becauſe it is in diſcharge, &c. Wherefore, &c. (4)
1 Cr. 509. 574.
Poſt. 356.
Co. 7. 26. b.
F. N. Br. 35. L.
Co. 6. 25. b.
Co. Lit. 129. d.

Sir William Fitz-Williams Caſe.

Endictment upon the Statute of 8 Hen. 6. againſt Sir William Fitz-Williams and divers of his Servants: For that they ſuch a day and year apud D. intraverunt in unum Meſſuagium exiſtens Liberum Tenementum cujuſdam Joh. Fitz-Williams Armig. & ipſum à Libero Tenemento ſuo inde injuſte & ſine Judicio diſſeſſiverunt; & ipſum ſic inde expulſum extra poſſeſſionem inde vi & armis ac manu forti extratenuerunt, & alia, &c. The firſt exception, For that it is alledged Quod intraverunt, and it is not ſaid pacifice, as the uſual courſe is, where the Endictment is forcible Detainer; For otherwiſe it may be that the Entry was alſo with force, which ought to be mentioned certainly. And every Endictment ought to be ſo certain that there ought not to be any ambiguity therein, which is the reaſon that an Endictment always mentions the Entry to be either pacifice or forceably, as the Caſe is, otherwiſe it is not good; and of that opinion were Gawdy and Yelverton: For Endictments ought to be precise (5)
3 Cr. 915.
Yelv. 32.
Poſt. 151.

Co. 4. 39. b.

and certain in every point, and shall not be taken by intendment: As Endicement, *Furatus est unum equum*, although that cannot be but Felony, yet because it wants the word *Felonice*, it is ill: So an Endicement, *Quod rapuit & carnaliter cognovit talem puellam contra voluntatem suam*, without saying *Felonice*, is ill: So an Endicement, *Quod Felonice & ex malitia sua præcogitata occidit* such an one, without saying *Murdravit*, is no Endicement of murder, although those words *tant mount*, *Wherefore*, &c. But Popham and Fenner held, that the Endicement was good enough, for the Endicement may be upon this Statute, upon both branches thereof, for the Entering with force, and Detaining with force, or upon any of them by it self: Then when the Endicement mentions that he entred generally, it shall never be intended to be with force, unless it be shewn; And an Endicement which chargeth any with a *Tort*, ought to be precise in the point of charging the offence or *Tort*, as in the Cases before put. But where the Endicement is not to charge him for his entry, but for his forceable Detaining only, it is good enough, for no force shall be intended unless precisely alledged. And although Endicements use to mention that he entred peaceably, it shall not be intended, but that without those words it may be good enough when it is not to charge him with any forcible Entry.

Termino Hillarii,

Anno primo JACOBI Regis in Banco Regis.

Harebotle *versus* Placock.

Ejectione firmæ, of Land and a Colepit in the same land, (1)
 the Defendant pleaded Not Guilty, and found against him, and now moved in Arrest of Judgment that the Declaration was not good, for he cannot demand the Land it self, and a Colepit in the same Land: for that is his petitum: Also the Ven. fac. was awarded to the Coronors, upon surmise that the Lessor was servant to the Sheriff, which was alledged to be no principal challenge, and then the Verdict is not well awarded, and it is not aided by the Statute of 32 H. 8. Co. Lit. 157.b.
 Thirdly, because the Juroys had taken meat and drink before their Verdict given, which is certified upon the Postea, but not examined at whose charge, which the Court said would make a great difference; For if it were at the cost of the party for whom they gave their Verdict, it will make the Verdict void; But if it were at their own costs, it is only fineable, and the Verdict good. Co. Lit. 227.b.
 But for the first point, they held it to be good, because it is a personal Action, and he demands nothing certainly. For the second point, they much doubted whether it were a principal challenge or not; and if it were not, whether it were holpen by the Statute: But Coke the Kings Attorney (who was of Counsel with the Defendant) said, that in 27 Eliz. in Packintons Case it was resolved, that it was not a principal challenge; and that the Ven. fac. awarded to the Coronors was ill, and not aided by the Statute: Co. Lit. 156.b.
 but the Court doubted, whether there were any such president. And Post. 547.
 I know, that in Spicers Case it was resolved otherwise, and Judgment given for the Plaintiff, notwithstanding this exception. 3. Cr. 581.
 Therefore the Court not being resolved in this point, advised the parties to begin de novo, and to have a new trial; which was done accordingly. Moor 826.
 Vid. Dy. 7.367.

Tuttesham *versus* Roberts.

Error of a Judgment in the Common Bench. The Case was such: An Ejectione firmæ was brought of 30. acr. terr. s. acr. prati, &c. in Cleyton: Upon Not guilty pleaded a special Verdict was (2)

was found, that one Bishop was seised of the Land in the Declaration mentioned, and of five Acres of Land in Cuckfield, called Wellcroft: And that the Lands in the Declaration, and the said Croft, were called by the name of Hefelands, and had been usually together occupied as one Farm, and that he being so seised; made his Will in this manner: As concerning the disposition of all my Lands and Rents, &c. He devised *inter alia*, All those his Lands and Tenements, lying in the Parish of *Cuckfield* called *Hefelands*, to his wife for life, and after her decease, that it shall remain to *John* his Son and his Heirs. And after divers other clauses, He Wills; That if *John* die without issue, *Hefelands* shall remain to his three Daughters in Fee. The sole question was, whether by this clause, All the lands called *Hefelands*, being an entire Farm, extending into Cleyton, (which is the Land now in question) and into Cuckfield also, shall pass: or only that which is in Cuckfield, Popham, Gawdy and Yelverton held, that the Daughters should take none of the Lands in Cleyton, and that only so much of Hefelands as extended into Cuckfield should pass; for John by the Devise hath clearly nothing but that which is in Cuckfield; For the Devise to the Feme, is of the Lands in the Parish of Cuckfield called Hefelands; which passeth nothing but that which is in the Parish of Cuckfield, it being first named. And if the words had been, of all his Lands called *Hefelands* in the Parish of Cuckfield; and part of Hefelands is in Cuckfield, and part in Cleyton; nothing had passed but that which is in Cuckfield. As if a man hath the Manor of Dale, in Dale and Sale, and grants his Manor of Dale in Dale; nothing in Sale shall pass. And the words being, It shall remain to *John* and his Heirs, That is, that which was devised before to the Feme: And where the words are, If *John* die without Issue, that *Hefelands* shall remain to his Daughters; That is, such part of Hefelands as was devised to John: And hereby the Estate of John is by Implication converted into an Estate tail; And the remainder of that Estate is to the Daughters, and no more. Fenner and Williams to the Contrary, because the Will is, As concerning the disposition of all his Lands: And in all the Will there is not any disposition of Hefelands in Cleyton, and all his other lands in every place are disposed. Wherefore, it shall be intended by the last clause that he meant to dispose them, &c. Also, He gave *Hefelands* to his three Daughters, which is to be intended, that he gave all Hefelands amongst them, giving them nothing more, in all the Will, for their advancement, but five Acres. Also it is after divers others clauses betwixt the Estate devised to John, and doth not follow it immediately. And Williams said, it should rather be construed that the first Devise to John being in fee, this second Devise of Hefelands should be a Devise unto him of the residue

1 Cr. 473.
Co. 3. 10. d.

Dier 261. b.

3 Cr. 299. 300.

residue of Hefelands in tail with a remainder to the Daughters :
Then that it should be said to be altogether omitted, and no De-
vise thereof to the Daughters ; But notwithstanding the other
three Justices held their former opinion, Et Adjournatur. After-
wards in Trin. secundo Jac. It was moved again, and then ad-
judged that the Land did not pass to the Daughters : And the
first Judgment given for the Daughters was reversed.

Mathematics

1. The first part of the book is devoted to the study of the properties of the real numbers. It begins with a discussion of the natural numbers and the integers, and then proceeds to the rational numbers and the real numbers. The properties of the real numbers are then used to prove the existence of the real numbers.

Termino Paschæ,
Anno secundo JACOBI Regis
in Banco Regis.

Countess of Arundel *versus* Steere.

TRESPASS, for cutting down of Trees, &c. The Defendant justifies by prescription to have Estovers, for that he was seised in Fee of such an house and land, and prescribed to have Estovers for the repairing of the said Houses, or for the building of new upon the said Land, and justifies for making reparations of a Bake-house, &c. And it was thereupon demurred; Because it was alledged that the Custom is unreasonable to take Estovers to build new houses. But all the Court (besides Williams) held that it was a good prescription; For one may grant such Estovers at this day, and by the same reason there may be a prescription for them. But Williams held that the prescription is not good; For it ought to be reasonable and usual, which is to repair ancient houses, and not to build new; For then he may cut down all the wood and destroy it. But notwithstanding it was adjudged for the Defendant. (1)

Barnes *versus* Worlich, Mich. 43 & 44 Eliz.
Rot. 548.

AUDITA Querela in Chancery to avoid Execution upon a Statute of 200 l. And alledges the Statute of 37 H. 8. & 13 Eliz. of Usury. And that after the Statute, viz. 27. April 41 Eliz. There was a communication betwixt the Plaintiff and Defendant; That the Defendant should lend him 100 l. for a year, and that it was then corruptly agreed betwixt them, that the Plaintiff (2)

Post. 67.
Yelv. 30.
1 Rol. 510.
13 El. cap. 8.

Plaintiff should pay unto him 10 l. for the forbearance thereof, viz. Upon the first of Novemb. next following 5 l. and upon the first of May then next following other 5 l. And should enter into a Bond of 20 l. for the payment of that 10 l. accordingly: And that he according to that agreement lent an 100 l. 27. April 41 Eliz. 1599. and took that Statute of 200 l. for the Repayment thereof, 1 Maij, 1600. and took Bond of 20 l. for the payment of 10 l. accordingly; which is above the rate allowed by the Statutes, and so void. The Defendant pleaded, that it was not corruptly agreed to take such a Bond, &c. whereupon they were at Issue; And by Mirtimus out of Chancery, it came hither to be tried, and by Nisi prius in London being found for the Plaintiff, it was now moved, That notwithstanding this verdict, Judgment should be for the Defendant. For, this surmise is not sufficient to avoid the Statutes. For the Usury agreed to be taken, is no more than the Statutes permit, and exceeds not the rate of 10 l. per 100 l. for the year, whereby to avoid the Assurance. And herein, the Case is no more, but that such a man lends an 100 l. for a year, and agrees to give 10 l. for it, to be payed half yearly, whether that be Usury within the Statutes. And Fenner and Yelverton held that it was. For when he lends it for one intire year, he ought to forbear his interest for a year, otherwise he doth not lend it for a year: And then the other payed more than he ought by the Statute. But if he contract to lend for half a year, he may reserve his interest according to that rate, &c. But Popham, Gawdy and Williams held, that it is not any other Usury than what the Statutes tolerate: For the Statutes be, that he shall not receive or take above that rate; And here he doth not take any more. For when he hath forborn his money for half a year, and the other hath the use of his money, for that time he shall receive of him 5 l. so he doth not receive more from him for the year than 10 l. And it is an usual course if one lends 100 l. for a year, and takes Land in mortgage of the value of 10 l. per annum, to receive the annual profits every day. And it is not any Usury, because he receiveth in the whole year no more than 10 l. only. So if he takes a grant of a rent-charge, payable quarterly, it is not any Usury above the Statute: (And Coke Attorney-General said, that he knew it to be adjudged accordingly.) But if he had agreed to take his money for the forbearance instantly when he lent it, That had made the Assurance void; For then he had not lent the entire sum for one year, and the other had not had the Use of his money according to the intention of the Law. And Williams said, That he knew upon this difference it hath been so resolved of late time. Wherefore it was adjudged for the Defendant, Quod Querens nihil capiat per breve. And Stephens said, he was of Council in one Snows case, where it was adjudged accordingly.

1 Cr. 283.
Yelv. 30.

Post. 77.

Sir John Thornel *versus* Lassels, Hill. 43 Eliz. Rot. 619.

Trespas, Quare Clausum fregit, 8. Maij, 43 Eliz. of a Close called the Head-land in the Over-Inge in Sturton, averiis depascendo, viz. Equis, bobus, vaccis, continuando usq; 25. Junij following; The Defendant pleads Quoad vi & armis, not guilty: Quoad Residuum transgressionis; Quod locus vocat. the Over-Inge continet in se 1000 aer. prati; and that he is seised in fee of the Mannor of Sturton, And that he, and all whose estate, &c. have had time whereof, &c. in the Over-Inge, pasture for two Geldings every year from the first of May until the grass there grown be cut and made into Hay, as to his Mannor aforesaid appertaining. And justifies the putting in of the two Geldings to use the Pasturage, and their continuance there until the 20 Junij Anno supra dicto. And avers that the Grass was not cut down and made into Hay until the foresaid 20. of June. And it was thereupon demurred, and moved, First, that this prescription is not good to claim it in name of Pasturage; Also he claims it as appurtenant to the Mannor, and he doth not say, that the Geldings were levant and couchant upon the Mannor; also the prescription is unreasonable, to have Geldings going in standing grass, until Hay made: For by their debuyling and desling the grass, it can never thereby be made into Hay. Sed non allocatur. For being in so great a quantity of Land, the going of two Geldings cannot defoul or debuyse it: but that Hay may well be made thereof. And it may be claimed by the name of pasturage, and without any Averment, that they were levant and couchant, &c. But it was then moved, that the Plea was not good in the manner thereof. First, because the Action is brought for Trespass, Cum Equis, bobus, vaccis, &c. And he justifies for two Horses, and speaks nothing of the Residue; so the Plea is ill in all. Secondly, the Trespass is alledged, 8. Maij 43 Eliz. with a continuando unto the 25. of June; and he justifies from the eighth of May unto the foresaid 20. day of June, so he speaks nothing of the four last days. Thirdly, he claims this pasturage from the Mannor of Sturton, and doth not shew in what County this Mannor lies. And these were faults incurable. Wherefore it was adjudged for the Plaintiff.

Pl.Com.138.a.

Mackworth *versus* Shipward, Mich. 44 & 45 Eliz.
Rot. 32.

Replevin. The Defendant made consuance as Bayliff to the Lord Berkley for a Relief due unto him; whereupon it was demurred. The Case was such; A Tenant of the Queen, who held of her by Service of Knighthood in capite held also other lands of the Lord Berkley by Knights Service, and died, his Heir within

within age, and in Ward to the Queen, as well for the one land as for the other by her Prerogative: The Heir at full age sues Liberty, afterward the Lord Berkley distrains for Relief; And whether he shall pay Relief for those Lands which were in Ward, was the Question; And after divers arguments at the Bar it was resolved that he should pay Relief; For although this Land was in Ward, yet the Lord had not the benefit of the Wardship: wherefore it is all one to him as if he had died, his Heir of full age. And the Lord is to have the Wardship or Relief, as a profit rising from his service; And although Littleton saith, that the Lord shall have Relief, where the Tenant dies, his Heir of full age; yet that doth not exclude him to have the benefit thereof, when the Tenant dies, his Heir within age, where he cannot have the benefit of the Wardship. But Popham said, that if in such Case where the Tenant dies, his Heir within age, the Lord refuseth the Wardship; there peradventure, because it is his own Act, he shall not have Relief. Vide 26 H. 8. 8. 13 H. 7. 15. 24 Ed. 3. 24. 39 Ed. 3. Relief 1. Stanf. fol. 9. Bract. fol. 85. Old N. B. 93. Wherefore it was adjudged for the Defendant. Afterwards it was moved upon the Stat. 21 H. 8. cap. 19. whether the Defendant, (for whom the Judgment was given) should have Costs and Damages. For the Statute gives it upon Abowries for Rents, Customs or Services, or Damage-felant. And this Relief is not any Service, but a Flower of the Service, and shall go to the Executors. And it hath been resolved, that in Abowry for an * amercement the Defendant shall not have Costs. Popham, upon a distress for an Heriot there is not any question but Costs shall be payed. But for the other point, because the principal case was adjudged upon a new point, and they not then satisfied whether in this case Costs were allowable; They advised the Defendant to take his Judgment for the Relief, the Plaintiff offering it in Court, and to Release his Damages and Costs. Which was done accordingly.

Co. Lit. 83. b.

Lit. Sect. 112.

Co. Lit. 83. b.

1 Cr. 534.

* 2 Cr. 300.
Post. 520.
3 Cr. 329.

Hudson *versus* Banks, Pasch. 44 Eliz. Rot. 482.

(5)

ERROR of a Judgment in Debt in the Common Bench. The first Error assigned was, Because upon the Ven. fac. one Randol Sewel was returned: and the Distringas was Randol Sewel; and the Sheriff upon this returned Rannus Sewel, who was sworn. Sed non allocatur, For the Court shall intend Randol and Rannus to be both one person, and that it is his name briefly written. Another Error assigned, because Rob. Vaux de Ulton was returned upon the Ven. fac. & Distringas. Et idem Rob. Vaux pro defectu Juratorum comparuit, is returned and sworn upon the Tales de circumstantibus, which was confessed by the In nullo est Erratum pleaded. But the Court (Gawdy & Fenner absentibus) held

1 Cr. 203.
Post. 534.

held it to be no Error: For it is contrary to the Record; For it shall be intended several persons, and not one and the same: And although *In nullo est Erratum* be pleaded, That is not any confession, but Quasi a Demurrer, because it is not an Error assignable. And Williams denied the Case which was cited at the Bar, viz. That if a Juroꝝ be *Trait* by challenge, and afterwards tries the matter, It is not assignable for Error, because it shall not be intended to be one and the same person, but several persons; and he shall be esopped to say the contrary. Vide 12 H.4. Et Hill. 32 Eliz. betwixt Hungate and Hamond. And afterwards the Judgment was affirmed. Post. 244.
Ante 12.
3 Cr. 183.

Countess of Rutland *versus* Earl de Rutland.

UPON evidence to a Jury it was held by all the Court, and so delivered for Law to the Jury; That if there be an Indenture for the levying a Fine to such persons, before such a time, to such Uses, and the Fine be levied to the same persons within the same time, It shall be to the same Uses; And no averment can be to the contrary, unless it be by other matter in writing. But if a Fine be levied to other persons, or at another time after, it may well be averred by *Parol* to be to other Uses. For in the first case the Indenture is directory to the Fine, and in the other case it is but Evidence. (6)
Co. 5. 25. b.
Co. 5. 26. a. b.
Co. 9. 10. b.
Co. 5. 26. b.
Co. 2. 76. a.

Ognel *versus* Randol.

AUDITA Querela was brought to avoid Execution of a Judgment, and surmisseth, that after the Judgment he had payed the entire Sum. Popham, such surmise is not any surmise to avoid a Judgment, upon a bare payment, without writing, or other matter of Evidence, no more than it is any Plea, to bar an Execution, demanded by *Fieri fac.* or *Scire fac.* Tanfield Serjeant, It was ruled in this Court betwixt Malins and the Lady Hawkins, That it was a good surmise in an Audita Querela to avoid Execution of a Judgment: For it is not only a Suit in Law but in Equity also. And it is as a Commission to examine the cause: For it is not reason that if the money be satisfied, he should lie in Execution. And so held all the Court (besides Popham) that it was a good surmise in this case; whereupon he was let to Bail. (7)
1 Cr. 328.
3 Cr. 634.

Powel *versus* Peacock, Hill. 45 Eliz. Rot. 156.

TRESPASS, For cutting down of Elm-trees, brought by the Lord of a Mannor: The Defendant justifies as Copyholder for life, For that *Infra Manerium*, *usitatum fuit a tempore*, &c. To cut down and carry away at their pleasure any Elms grow. (8)
1 Rol. 560.

11 Rol. 560.

1 Cr. 221.

Hob. 11.

Aste 25.

Co. 6. 60. 2.

growing upon the said Tenements, and shews that he was Tenant for life, &c. And it was thereupon demurred, and the greater part held the custom to be unreasonable that a Copyholder for life should cut down Timber-trees, which by Intendment had not their growth in his time; and by that means, the succeeding Copyholder should not have any for his use to repair his house. But because it was pleaded *Quod Quilibet tenens customarius of any Customary Tenement, &c.* And he doth not say *de Quel Estate*, It was held to be too large and unreasonable for any one who hath but for a month, or at will, that he might by that custom cut down Trees. And was therefore adjudged for the Plaintiff.

Termino

Termino Trinitatis,

Anno primo JACOBI Regis in Banco Regis.

Auncelme *versus* Auncelme.

T Respals upon a special verdict : The Case was ; A Copyholder in fee surrendered to the use of Martha his wife for life, Remainder to Matthew his younger Son in fee, and died : Martha was admitted, but Matthew refused to be admitted during the life of Martha ; Afterward Matthew, without other admittance, surrendered to the use of the Plaintiff, in the life of Martha, who was admitted accordingly : Matthew and Martha died ; and the Son of Matthew procures himself to be admitted, and enters, claiming the Land. And whether his Entry was congeable, was the question : because Matthew surrendered before admittance. Popham, Fenner and Yelverton (*cæteris absentibus*) held, that this admittance of the Feme was an admittance of him in remainder, without any other admittance. For the Feme, being admitted to the particular Estate, the remainder depends thereupon, and vests without other admittance ; For they make but one Estate : Wherefore they resolved for the Plaintiff. But by reason of an imperfection in the verdict, no Judgment was given : For they found Quoad parcel' Tementorum, this special matter, but they did not shew what parcel ; and they found nothing for the residue : Wherefore the Verdict was held to be ill for both, and a Ven. fac. de novo awarded.

(1)

3 Cr. 662.
Co. 4. 23. a.Post. 133. 653.
1 Cr. 452.
Co. Lit. 227. a.

Sir Edward Clere *versus* Parker.

This Case was now moved again (Vid. Pasch. 44 Eliz.) and adjudged upon the matter in law, for the Defendant in the writ of Error, that the first Judgment should be affirmed ; and Coke Attorney-General being present, said, that Husleys Case in the Exchequer after argument was adjudged accordingly ; that it should not Enure by way of Devise, but as a limitation upon the former feoffment. For otherwise the Will should be utterly void.

(2)

3 Cr. 877.
Co. 6. 17. b.Co. 6. 18. b.
Co. Lit. 111. b.

Andrews *versus* the Lord Cromwell.

Endictment upon the Statute 8 Hen. 6. against the Lord Cromwel and others of his Servants ; For that they 16. July 44. Eliz. vi & armis & manu forti disseverunt præfatum Edward Andrews

(3)

8 H. 6. c. 9.

drews of such Lands, &c. Et adhuc extra tenent eundem Edvardum Andrews contra pacem dictæ nuper Reginae Elizab. The Enditment being found at Lent Assises primo Jacobi Regis, The first exception was taken by Serjeant Harvy Junior, for that the Enditment is disseverunt, and it doth not say Expluerunt, as the common form is; but all the Court held it to be well enough; for Disseisin implies Expulsion; and it is sufficient to ground an Enditment, and there may be cause for this Enditment; for he in Rebellion or Leste for years is expelled. Secondly, because it is alleged Quod adhuc detinet, which is a Tort, and yet it is not said, Contra pacem Domini Regis: But it was held to be well enough; for the Detainer may be without force and not against the peace: Wherefore the Enditment was good, and restitution was awarded thereupon.

Barnes versus Constantine.

(4)
Yelv. 46.

Action upon the Case: For that he procured him to be Endited as a Common Barretor before J. S. and J. D. Justices of the Peace; Nec non ad diversas Felonias, &c. audiend. & terminand. assignat. And that he was acquitted; The Defendant demands Oyer of the Record, which is entred in hæc verba; wherein they are mentioned as Justices of the Peace only, whereupon the Defendant demurred: Because it appears, that it is not the same Record whereof he now counts: And of that opinion was Williams, But all the other Justices è contra. Because the Justices of Peace have authority to enquire and hear it, without any special Commission of Oyer and Terminer; and their Commissions are equal to that purpose; and therefore all one, and no failer of Record.

Post. 358.633.
Pl. Com. 485.
Yelv. 46.

Dawbeney versus Bannester.

(5)

DEbt: Upon an obligation in the Common Bench. The Defendant confess the Action, and Error was brought upon that Judgment, because in the Declaration it is not said hic in curia prolata. And it was held to be a fault in Matter, and not of Form only; and notwithstanding the Action confessed, might well be assigned for Error. And for this cause, and by reason of a discontinuance, it was reversed. Vide 18 Ed. 4. 16.

Co. 10.94. b.

2 Sand. 407.

Ellis versus Warnes, Pasch. 1 Jac. Rot. 507.

(6)
Yelv. 47.
Moor 752.

DEbt: Upon an Obligation of 200 l. The Defendant pleads the Statute of 37 Hen. 8. and 13 Eliz. of Usury, in abstinence of the Bond, and shews that he was indebted to one Alder in 100 l. and agreed with him for the forbearance of that 100 l. for a year, that he would give unto him 30 l. and make a Bond

Bond to Alder of 60 l. for the payment of the said 30 l. and for the payment of the 100 l. principal. He and Alder entered into this Bond of 200 l. to the Plaintiff. So it being made upon this usurious and corrupt Contract, is void, Et hoc, &c. The Plaintiff saith, that Alder was truly and justly indebted unto him 100 l. and that for the payment of this just Debt of 100 l. he and the Defendant entered this Bond to the Plaintiff; and that he was not knowing and privy to any corrupt agreement betwixt the Defendant and Alder, Et hoc, &c. and it was hereupon demurred. Tanfield Serjeant, for the Defendant moved, that the Replication was not good, because he doth not deny the corrupt agreement alleged in the Bar; but by *Nient dedire* confesses it; And although he were not privy to the corrupt agreement, it is void; for otherwise it would be a practice for every Usurer to avoid the Statutes. For he would always be justly indebted in the principal sum, and would contract for the usury-money in his own name, and take the assurance of it to himself; but to be assured of the principal, he would cause the Bond to be made to one to whom he is justly indebted, who should not know of the Bargains betwixt them: And so by such practice they would escape out of the Statute of 13 Eliz. Wherefore this Bond being made upon such corrupt agreement, is void, &c. Gawdy, Yelverton and Williams held, that the Replication is good; for inasmuch as it is averred that it was made unto him for a true and just Debt, and that he was not knowing or privy to any corrupt agreement between them, it is not reason he should be delayed of his due Debt. For as on the one side it may be said to be the means to defraud the Statute: So on the other side, it may be a greater mischief to a true Creditor, when he shall take security by Bond, with Sureties for his money, if it should be examined whether there were any corrupt agreement betwixt his Creditor and his Sureties, whereof he cannot by intendment have any consistance; and it would be a means to draw in question every Debt, and to punish one who is not privy to any corrupt agreement; Wherefore it being confessed by Demurrer, that this Bond was made unto him for a true Debt, and that he was not privy to any corrupt agreement between them, the Bond is good, otherwise there might be great prejudice to true Creditors. For peradventure, upon the making the Bond, he delivered up his ancient Bond; or if his Debt were by contract, by the taking that Bond his Debt should be gone: Wherefore, &c. Fenner doubted thereof, because it being grounded upon corruption, is altogether ill. And every one is to take heed to his assurance at his peril. Popham was absent: Wherefore the other three adjudged it for the Plaintiff.

Moor 752.
Yelv. 47.
3 Cr. 588.

Mason *versus* Chambers.(7)
Yelv. 42. 47.

1 Cr. 207.

Yelv. 48.

Co. 6. 55. b.
Pl. C. 191. b.
Co. 2. 35. a.
1 Cr. 548.
Co. 10. 113. a.

UPON a special Verdict, the Case was such; The Prior of Woubridge let the Tythes of Corn and Hay of the Rectory of Loppington, by Indenture to J. S. for 40 years, rendring 4 l. per annum at the Annunciation and Saint Michael. The Lessee Covenants to bring the Rent to the Priors house, the Prior and Covent covenant to abate him 20 d. at every day of payment, in respect of the Portage. Afterward the Lessee payed always 3 l. 16 s. 8 d. and retained 3 s. 4 d. The Priory being dissolved, the Queen made a Lease to the Plaintiff of the Rectory of Loppington, and of all the Tythes thereto appertaining: And of all Messuages, Lands, Tenements and Hereditaments in the tenure or occupation of the said J. S. Sub annuali redditu 3 l. 16 s. 8 d. habendum. If no Lease be in esse, from the Date of the Patent, for 21 years, and if any Lease be in esse of the Rectory or any part thereof, then from the end of that Lease for 21 years; and afterwards sells the Rectory, without mentioning this Lease to the Defendant: And whether this second Lease were good or not, was the question. First, it was moved whether this Covenant to abate and deduct 20 d. upon every day of payment, being by the same Indenture, be such a defalcation of the Rent, as that it may be said to be in tenura J. S. under the Rent of 3 l. 16 s. 8 d. And all the Court resolved that it was not; for the Rent reserved is 4 l. and the other part is but a meer Covenant, and no alteration of the Rent. Secondly, whether this Lease being of the Rectory of Loppington and all Tythes thereto appertaining (which is as it were a distinct sentence by it self) and the words after *Ac omnia Messuagia, Terras Tenementa, &c. in tenura, &c. sub annuali redditu 3 l. 16 s. 8 d.* whether these words *sub annuali redditu* refer to all precedent, or only to the last words, and if this mispision of the Rent shall make all void: Gawdy held, that the words at the first were distinct by themselves, and sufficient to pass the Rectory: Which is a thing known, and the Rent refers not to those things which were certain before, but only to the last words; Wherefore it is good enough. But all the other Justices held, that by reason of this mispision of the Rent, the Lease is void; Popham, mispision of the Rent or of the value, in some Cases shall make the Lease void, in some not; as if the Queen should let the Manor of D. *Quod quidem Manerium* is of the annual value of 4 l. where it is not let for such a Rent, and the Rent or Value is mis-recited, yet the lease is good, because there is a certainty before, and the Addition of *Quod quidem, &c.* is not material. But if she lets the Manor of D. of the annual Rent of 4 l. which is intended to be of such a value, and is let at a greater Rent, or appears upon Record to be of a greater value, it is

is void, because in the first Case the intended to pass the Hannon, and the addition of the Quod quidem, &c. is but to add another certainty: But when it is in one sentence, That it is of such a value, and that in tali parte; Her intent appears, not to grant a thing above such a value. And therefore it is otherwise. This Lease also is not good, because it is habendum, if no Lease be in esse, immediately; and if a Lease be in esse, from the time of the end of such a Lease: And here there is a Lease in esse of part of the Rectory, viz. of the Corn and Hay: So all is not out of Lease, nor all is not in Lease, and therefore void for this cause; Wherefore, &c. But no Judgment was given, because upon the Courts motion the parties agreed.

Philips *versus* Echard, Ante fol. 8.

This Cause being moved again, the Court resolved that the Defendants plea was good. For when he avers, that the Statute is in its force, and the money not paid, it is good enough prima facie, until the contrary be shewn; and it shall be intended to be made for a just Debt, and he who will take advantage of the contrary, ought (and it is fittest for him) to shew it: Wherefore Rule was given, that Judgment should be entered for the Defendant. The Plaintiff then moved, that there was not any continuance entered upon the Roll, and therefore prayed it might be discontinued. But the Court said, that the Plaintiff could not discontinue it without the Courts direction, and that the Defendant might well continue it, being for his advantage: Wherefore they appointed the continuances to be entered accordingly; For otherwise in every Case when a matter is brought to argument upon Demurrer, the Plaintiff seeing the opinion of the Court to incline against him, will cause a discontinuance to be entered; which ought not to be in the same Term it is argued. And note, that in a Case betwixt Alderley and Alderley this Term, in Debt upon an obligation upon Demurrer; the Case being argued, the opinion of the Court was against the Plaintiff, and rule given that Judgment should be entered for the Defendant. And the Plaintiff prayed that he might be Non-suited, and because he had the same Term appeared and argued by his Council, and had prayed Judgment, he could not be Non-suited the same Term.

Sir Percival Willoughby *versus* Egerton, Hill. 43 Eliz. Rot. 670.

Error of a Judgment in Chester in Formedon. The first Error assigned, because the parties being at Issue, a Ven. fac. was awarded to the Sheriff, and afterwards upon Entry, Quod vicecomes non misit breve, a Ven. facias was prayed and awarded to the Coroners; which ought not to be: For being

Post. 304.

once awarded to the Sheriff, the Plaintiff hath admitted him to be a person qualified to make the Return; and the same Sheriff not being removed, he cannot without cause, since arisen, pay a Ven. fac. to the Coroners; Wherefore this award of the Ven. fac. to the Coroners is Error: But because that being awarded upon the Roll is but as a continuance, and there was not any Ven. fac. taken forth, and it is but matter of form to make such a continuance, therefore it was held to be well enough. 22 Ed. 4. 3. Dyer 344. 357. 14 Hen. 7. 6. & 19. 29 Ed. 3. 14. 11 Hen. 7. Rot. 29. A second Error assigned, because it appears by the Record, that upon the Ven. fac. returned, the Tenant made Default, and Judgment entered: Ideo consideratum est quod Petens recuperet seisinam: and he doth not say, Ideo recuperet per defaultam, as it ought to be where the Judgment is by Default. But the Court held, that it was well enough; For when the Record mentions, that the Tenant made Default; and it is Ideo Querens recuperet seisinam: It is upon the matter a Judgment upon Default, and the Presidents are both ways. Wherefore, &c.

Joyner *versus* Lambert.

(10)

Co. 4. 23. a.

3 Cr. 662.
Co. 4. 22. b.

TRESPASS. The Case was: Lord of a Manor seileth a Copyhold without cause, and grants it to another in Fee, The Grantee dies seiled, and his Heir is admitted; The first Copyholder dies, his Heir enters, and surrenders to the use of a stranger, Whether his entry was good or no was the Question. And it was resolved, That a descent of a Copyholder shall not take away the Entry of another Copyholder who hath right. Secondly, That the Heir entering without Admission, his Entry is lawful, and being in, his surrender is good.

Hull *versus* Shar-Brook.

(11)

Co. Lit. 59. a.
Post. 101.

Co. 4. 25. b.

TRESPASS. Upon a special Verdict, the Case was; A Copyholder surrenders upon condition, and afterwards by his Deed releaseth the condition; whether it were good without surrender was the Question: And resolved that it was; For properly a Right or condition cannot be given or determined by surrender, but by release: And so it was resolved in the Case of Kite and Queinton. Wherefore it was adjudged accordingly.

Fareley's Case.

(12)
1 Cr. 563.

PROHIBITION. It was held by all the Court, That if a Copyholder makes a Lease for years of Land whereof a Feme by Custom is to have her widows Estate, she shall not avoid the Lease, unless there be an especial Custom to avoid it: For

For he comes under the Custom, and by the Lords licence as well as the Feme. And this Case depended before the Council of the Marches of Wales, They giving orders there against the Lessee for the Feme; and a Prohibition was granted to stay the Execution of those orders.

Memorandum, That by Command from the King, All the Justices of England, with divers of the Nobility, viz. The Lord Ellesmere Lord Chancellor, The Earl of Dorset Lord Treasurer, Viscount Cranbourn Principal Secretary, The Earl of Nottingham Lord Admiral, The Earls of Northumberland, Worcester, Devon and Northampton, The Lords Zouch, Burghley and Knowles, The Chancellor of the Dutchy, The Archbishop of Canterbury, The Bishop of London, Popham Chief Justice, Bruce Master of the Rolls, Anderson, Gawdy, Walmsley, Fenner, Kingmil, Warberton, Savel, Daniel, Yelverton and Snigg, were assembled in the Star-Chamber, where the Lord Chancellor after a long Speech made by him concerning Justices of Peace, & his Exhortation to the Justices of Assise, and a discourse concerning Papists and Puritans, Declaring how they both were disturbers of the State, and that the King intending to suppress them, and to have the Laws put in Execution against them; Demanded of the Justices their Resolutions in three things. First, whether the Deprivation of Puritan-Ministers by the High-Commissioners, for refusing to conform themselves to the Ceremonies appointed by the last Canons was lawful? Whereto all the Justices answered, That they had conferred thereof before, and held it to be Lawful, Because the King hath the Supream Ecclesiastical Power, which he hath delegated to the Commissioners, whereby they had the power of Deprivation by the Canon-Law of the Realm. And the Stat. of 1 *El.* which appoints Commissioners to be made by the Queen, doth not confer any new power, but explain and declare the ancient power. And therefore they held it clear, That the King without Parliament might make Orders and Constitutions for the Government of the Clergy, and might deprive them if they obeyed not. And so the Commissioners might deprive them. But they could not make any constitutions without the King: And the divulging of such Ordinances by Proclamation is a most gracious Admonition; And for as much as they have refused to obey, they are lawfully deprived by the Commissioners *ex Officio*, without Libel, *Et ore tenus convocati*. Secondly, whether a Prohibition be grantable against the Commissioners upon the Statute of 2 *H. 5.* if they do not deliver the copy of the libel to the party; Whereto they all answered, That that Statute is intended where the Ecclesiastical Judge proceeds *ex officio & ore tenus*. Thirdly, whether it were an offence punishable, and what punishment they deserved, who framed Petitions, and collected a multitude of hands thereto, to prefer to the King in a publick cause, as the Puritans had done, with an Intimation to the King, That if he denied their Suit, many thousands of his Subjects would be discontented? Whereto all the Justices answered,

(13)

Moor 755.

Moor 755.
Co. 5. 1. 8. a.

4 Inst. 523.

4 Inst. 323.

Moor 756.

Post. 388.

Moor 758.

answered, That it was an offence fineable at discretion, and very near to Treason and Felony in the punishment. For they tended to the raising of Sedition, Rebellion and discontent among the people: To which Resolution all the Lords agreed. And then many of the Lords declared, That some of the Puritans had raised a false Rumor of the King, how he intended to grant a toleration to Papists: Which offence the Justices conceived to be heinously finable by the Rules of the Common Law, either in the Kings Bench, or by the King and his Council; or now since the Statute of 3 H. 7. in the Star-Chamber. And the Lords severally declared how the King was discontented with the said false Rumour, and had made but the day before a protestation unto them, that he never intended it, and that he would spend the last drop of blood in his body before he would do it; and prayed that before any of his Issue should maintain any other Religion than what he truly professed and maintained, that God would take them out of the world.

Termino

Termino Michaelis,

Anno secundo J A C O B I Regis in Banco Regis.

Eliz. Coupledike *versus* Hester Coupledike.

ERror of a Judgment in Detinue in the Common Bench. (1)
 The first Error was, because in a Writ of Detinue brought it was returnable, Mich. 44 & 45 Eliz. and therein the Plaintiff was Non-suited: Notwithstanding in Hill. 45 Eliz. he declared and proceeded to Judgment without a new Original; This being assigned, and in Nullo est Erratum pleaded, it was now alledged Ore tenus, That it was but a mispision; For the Non-suit was entred in Brownlows Office, whereas the Impar lance was in Scottons Office (who was another of the Prothonotaries) So there was not any Non-suit in rei veritate. Sed non allocatur. For the Court doth not take any Consuance of such distinction of Offices: And it is but one entire Record. A second Error assigned was, for that the Writ supposeth a Detainer de una domo vocat. a Bee-house, which cannot be, that a Detinue should lie of an house. Wherefore it was reversed.

Kellan *versus* Manesby.

Action for words. For that 1. January 45 Eliz. in præsentia & auditu quamplurimorum Subditorum Domini Regis he spake these words of the Plaintiff, Thou art a Thief, and hast stoln my Corn. After Verdict it was moved in Arrest of Judgment, That the Declaration is not good, because the speaking is alledged to be 45 Eliz. in præsentia Subditorum Domini Regis, who peradventure none of them understood those words, and otherwise it is not any slander: Sed non allocatur. For those words be but of form in a Declaration, and not material, if they had been altogether left out. And it shall not be intended, but that they well understood the words. Secondly, that the Declaration he spake those words of the Plaintiff, Thou, &c. appears to be ill; For they be spoken to the Plaintiff, and not of the Plaintiff. Sed non allocatur. For being spoken to the Plaintiff, they are spoken of him, and are all one. Thirdly, it was moved that for these words an Action lies not; because it may be, he stole his standing Corn, which is not Felony, nor Cause of Action; As if he had said, Thou art a Thief, for thou hast stoln my Apples, an Action lies not; For it shall be intended of Apples growing. But it

Post 663.205. it was held that the words were actionable; for stealing Corn, is intended reaped Corn, and in the worst sense. Wherefore it was adjudged for the Plaintiff.
 Post. 442.457.
 674.
 Hob. 331.

Southbys Case in the Court of Wards.

(3)
 32 H.8. cap.1.

Co. 9. 126.2.

NOte, That before Popham, Anderson and Flemming Chief Baron, Assistants of the Court of Wards, This Case was moved: One Rob. Southby seised in Fee of Land holden in capite of the annual value of 100 l. in consideration of the marriage of Marmaduke his third Son, with Isabel Newton, conveys part thereof, (of the value of 10 l. per annum) to the use of Isabel the wife of his Son for life, remainder to the said Marmaduke his Son for life, remainder to the Heirs of the body of the said Marmaduke, remainder to the right Heirs of the said M. the Son. Afterward Rob. Southby the Father died seised of the residue: And his Son sued Liberty, And afterwards Marmaduke the Son died, Isabel his Feme survived him, his Son being within age; The Question was, whether he shall be in Ward for his Body, living the Mother, tenant for life: And it was resolved by them and by Pepper the Surbeyer, and Heskot the Attorney, that he shall be in Ward, by the Equity of the Statute of 32 H.8. where two purchase to them and the Heirs of the one, and he who hath the Inheritance dies, his Heir shall be in Ward. So where the limitation is to the one for life, and the remainder to another in Fee, he shall be in Ward by the Equity of this Statute. And Popham said it was so resolved in the Case of one Wiseman. Vide Dyer 172. & 237.

Earl of Rutland Case in the Court of Wards.

(4)

NOte, That at the same time it was resolved by them in the Earl of Rutlands Case: Where Tenant for life, Remainder in Tail; He in Remainder in Tail levies a Fine to the tenant for life and her Husband, upon a Concessit tenementa, &c. to the said Baron and Feme for the life of the Feme, and dies after Proclamations; That it was not any Discontinuance or Bar of the entail, but during the life of tenant for life; nor is it any Bar, or alteration of the Entail after that estate determined.

William Houfes Case in the Court of Wards.

(5)

NOte, At the same time it was also resolved by them in the Case of one William House; That where a Mandamus issued after the death of William House, For that it was found that he died seised in Fee of such Lands in N. sed de quo vel de quibus tenentur, &c. Ignorant; where a Melius inquirendum issued, reciting the seisin found and the dying seised. Sed de quo vel de quibus

quibus, & per quæ servitia tenentur ignorant : So in the recital adds, Et per quæ servitia, more than is in the Inquisition. And upon this Altit the seisin is found as before, Sed de quo vel de quibus, vel per quæ servitia tenentur ignorant. And whether the Melius inquirendum be void by reason of this misrecital, or not, or whether it be good to entitle the King to the Wardship, was the Question. And it was resolved by them all ; That this double Ignoramus was sufficient to entitle the King : And that it was not any misrecital ; for when they find, that de quo vel de quibus tenentur ignorant ; and it is not found, by what services, it is thereby implied, That per quæ servitia ignorant : So it is good enough : And if it were not to be so intended, yet it is good enough, for the misrecital is of a thing not material. Wherefore, &c. Vid. 2 H. 7.

Baude Case, Hill. 1 Jac. Rot. 11.

BAUDE was Endited upon the Statute 8 H. 6. in this manner, (6)
 Ad Sessum Pacis, &c. Per Sacramentum 12 Juratorum extitit præsentatum, quod Willielmus Baude nuper de Moston juxta Tutbury in comitat. Derby Clericus primo Julij, &c. Vi & armis in unum Messuagium existens the Vicaridge House in Moston prædict. ad tunc existens liberum tenementum Henrici Trickett, Vicar there, intravit, & ipsum Henricum vi & armis ac manu forti expulit & disseisivit, &c. The first Exception was, in that it was said per Sacramentum 12, &c. And he doth not say proborum & legalium hominum. Sed non allocatur ; for they shall be so intended unless the contrary be shewn. Vide 11 H. 4. 41. Et Pasch. 42 Eliz. Hamonds Post. 634.
 Case. Secondly, for that it doth not appear in what County Marston is : for the words in Comitatu Derby refer to Tutbury. But it was held by Popham, that they shall be intended one entire name : But Gawdy è contra therein. But they all held that although they be several names, yet in the County of Derby shall be referred to them both. Thirdly, because it is not shewn when the Expulsion was, for they want the usual words, Ad tunc & ibidem. So it is not certain, As in 6 Ed. 6. Dyer 69. Endicment, that such a day and year Insultum fecit, & cum quodam gladio feloniousment percussit, &c. Because it is not said Ad tunc & ibidem, It was ruled to be ill. So here. But Gawdy said, That the reason there is, Because the offences are of several natures, viz. The Assault, being a trespass alone ; But in an Endicment of Trespass, as here, it is otherwise : So in a Declaration. Whereupon Rule Post. 362.
 was given that it was good, and Restitution was awarded.

Hall *versus* Fettyplace, Pasch. 2 Jac. Rot. 292.

(7)
1 Rol. 640.
Moor 758.

PROHIBITION. For Tythes; Whereas he was seised in Fee of three acres of Meadow infra parochiam de Sunning; And that within the said Parish there is such a Custom, That every one seised of any Meadow within the same Parish have used Time whereof, &c. To cut down the grafs upon such a Meadow growing at their proper Costs, and the said grafs to Ted and shake abroad, and the said grafs so dispersed and cast abroad, to gather into weoks and windzows, and to put into small Cocks: Et post primam circumlationem inde, The tenth Cock inde to set forth for the Parson, or his Fermer, in satisfaction of all Tythes, as well of the first Howth as of the later Howth of that Meadow for the same year: Which the Parson, &c. had used to accept, &c. And alledgeth in fact, That he did so, in such a year; and that the Defendant sued him for Tythes of the later Howth, &c. And hereupon the Defendant demurred: And it was moved for the Defendant; That this Prescription was not good: because there is no more given to the Parson than he ought to have; For by giving unto him the tenth Cock, it is that, which the Law appoints, and therefore cannot be recompence for another thing: For the tenth of the Hay of the first Howth cannot be satisfaction for the tenth of the after Howth. But because it was alledged, that he at his own Costs had tedded and shaken it abroad, and gathered it into weoks and windzows, and made it into little Cocks, and so was at a greater labour and charge than the Law appoints, and the Parson hath benefit by the said labour; It is a good cause of discharge: And a president was shewn, Pasch. 37 Eliz. Rot. 284. in this Court betwixt Awbrey and John Parson of Barghfield in Comit. Berkshire, where it was surmised, That every Inhabitant there had used to cut down the grafs in the Meadows at the first Howth, and at his costs to make it into Hay, and to set forth the tenth Cock of Hay in satisfaction of the Hay coming as well of the first Howth as of the later. And it was adjudged to be a good bar for the Tythes of the later Howth: which was held to be all one with this Case in Question. And Popham said, he had known it to be resolved, That of right, without any special Custom alledged, No Tythes shall be payed for Hay of the later Howth; For the Rule in our Law is, that Tythes shall be payed Ex annuatis renovantibus simul & semel. Wherefore without view of any precedents, or hearing argument therein, they agreed, That the Prohibition should stand.

1 Cr. 403.
Post. 116.
Hob. 250.
Moor 758.

3 Cr. 660.

Yelv. 86.

Gerrard *versus* Holland.

Action *Sur le Case*. For that the Defendant apud W. spake (8)
 these words of the Plaintiff, Thou art a Thief. The De- Yelv. 49.
 fendant Justifies: For that at D. within the same County the
 Plaintiff stole two sheep. The Plaintiff saith, *De son tort De-*
mesne, &c. And issue being thereupon joyned, Ven. fac. was
 awarded tam de W. quam de D. Where the Justification was
 made, and found for the Plaintiff and adjudged for him; and
 Error thereof brought and assigned, Because the Ven. fac. ought
 to have been from D. only where the Issue was, and not from both
 places. Sed non allocatur. For although it might have been well
 awarded from D. only, yet being awarded from both it is well
 enough, because both matters are to be enquired of, whereof those
 of the Issue of W. may have the best notice: Wherefore the
 Judgment was affirmed, Vide 5 Ed. 4. 21 H. 6.

Yelv. 49.
 3 Cr. 870.
 Post. 95. 127.
 Post. 191.

Dent *versus* Oliver.

Action *Sur le Case*. Supposing, that he was seised in Fee of (9)
 the Mannor of Hallington, and of a Fair to be held there Post. 122.
 every Ascension day: And that the Defendant disturbed him to
 take Toll, &c. The Defendant pleaded Not guilty; and found
 against him: And now moved in Arrest of Judgment, that the
 Declaration was not good: Because he doth not shew a Title to
 the Fair by Grant, nor by Prescription: So he hath not any cause
 of Action. Sed non allocatur; Because it is but a conveyance to
 the Action, and is not any claim thereof as to the Right, as in a
 Quo Warranto; and therefore the Declaration without special
 Title comprised therein, is good. Wherefore it was adjudged for
 the Plaintiff.

1 Cr. 575, 571. 1 Vul. 275, 318.
 Post. 46, 70, 86. 2 Vul. 129, 292.
 258.

King *versus* ---- Hill. 1 Jac. Rot. 479.

Error. For that a Writ of Habeas Corpora with Nisi prius be- (10)
 ing awarded; A Writ of Superedeas was granted and deli- Yelv. 57:
 vered to the Sheriff, for staying the Return of the writ. And
 he notwithstanding returned the writ of Habeas Corpora at the
 Assises, whereupon the Trial was had, and Judgment accordingly;
 And it was held to be a manifest Error: As the proceedings in an
 inferior Court after Habeas Corpus delivered without a Proceeden- 1 Cr. 261.
 do. Wherefore it was reversed. 3 Cr. 33.

Elinor Pigot *versus* Thomas Pigot.

(11)
Yelv. 54.
32 H. 8. c. 30.

R Eplevin: The Defendant avows for Rent, for that Elinor Enderby was seised of the place where, in Fee, and took one Thomas Pigot to Husband, and had issue by him John Pigot, and died; And Thomas Pigot being Tenant by the Courtesie, the Reversion in Fee to John Pigot; and the said John Pigot granted a Rent-charge for life to the Defendant, and shews the death of the Tenant by the Courtesie, and so avows, &c. The Plaintiff saith, that Elenor Enderby was seised in Tail, and so conveyed it to John Pigot in Tail, and that John granted the Rent and died, and that the Land descended to the Defendants wife, as heir in Tail, absque hoc that Elinor Enderby was seised in Fee: and hereupon they were at Issue; and found for the Defendant: and now moved in arrest of Judgment, that this Issue was not well joyned. For the Seisin in Fee of the Grantor ought to be traversed, and not of an Auncester *peramont*; For that is not material. But how the Grantor was seised is only material, therefore the Issue taken is ill; and of that opinion was Gawdy: But all the other Justices held, That in regard the Seisin in Fee is especially alleged in Elinor Enderby; and the conveyance of the Reversion to John Pigot, as it ought to be of necessity; (for otherwise the Reversion cannot be conveyed unto him:) therefore the Seisin alledged in her might be well traversed, and if it be not an apt Issue, yet it is aided by the Statute of 32 Hen. For it is an Issue, although it be not an apt Issue. Wherefore it was adjudged accordingly for the Avowant.

Dier 107. a.
Post. 625. 681.
Co. 6. 34. b.
1 Cr. 494.

Yelv. 54.

France *versus* Tringer.

(12)

T Respals: The Defendant justifies, for that he had common for all his beasts levant and couchant in the place, &c. by prescription, and put in the said Cattel Utendo communia, &c. The Issue was upon the prescription, and found for the Defendant; And exception now taken, because he doth not aver that his Cattel were levant, &c. That no Judgment ought to be given. Sed non
11 Gul. 1. 65. allocatur. For the want of Averment is aided by the Statute of
11 Gul. 1. 120. Jeofails. Wherefore it was adjudged for the Defendant.

Wadhurst *versus* Damme, Trin. 2 Jac. Rot.

(13)

T Respals: For that Apud Edenbridge in Comit. Cant. he killed his Dog being a Mastive-Dog; The Defendant pleads that Sir Francis Willoughby was seised in Fee of a Warren in D. within the same County, whereof he is and then was Warrener, and that his Dog was divers times killing Co-
nies

nies there; and therefore he finding him there, tempore quo, &c. running at Conies, he there killed him, Absque hoc, &c. That he is guilty apud Edenbridge prout, &c. And it was thereupon demurred. First, because he traverleth the place only, &c. and doth not Travers all other places. And secondly, for the matter of the Justification: But all the Court held, that the Travers was good, when his cause of Justification is Local, and that he needed not alledge any more than that place. Also that the matter of Justification is good, because it being alledged that the Dog used to be there killing Conies: it is good cause for the killing him, in salvation of his Conies; for having used to haunt the Warren, he cannot otherwise be restrained: But Yelverton doubted thereof, for that it is not not alledged, that the Master was Sciens of that quality, or had warning given unto him thereof. Popham, The common use of England is, to kill Dogs and Cats in all Warrens as well as any Termin; which shews that the Law hath been always taken to be, that they may well kill them: So the Justification is good. Wherefore it accordingly was adjudged for the Defendant.

Co. Lit. 282.b.
Post. 372.

1 Cr. 487.

Hargraves *versus* William Rogers.

DEbt for 60 l. For that in the Common Bench, Term. Mich. 42 Eliz. John Rogers and William Rogers the Defendant, and John Wood recognoverunt se debere to the Plaintiff, viz. the said John Rogers 120 l. and the Defendant, and John Wood, Et uterque eorum in 60 l. If the Plaintiff should bring Debt of 60 l. against Rogers before Octabis Hillarii next following, in Communi Banco, that he within eight days after warning should appear by himself or Attorney, and if he were condemned, should satisfy the debt, or render himself to the Prison of the Fleet, there to remain until he satisfied: And alledged in fact, That he 28. Octob. 24 Eliz. brought a writ of Debt of 60 l. returnable Octab. Martin. following, in the Common Bench against John Rogers; And that the Plaintiff and Defendant appeared at the day by their Attornies; and it was so far proceeded in the same Court, that it was adjudged, that the Plaintiff should recover his Debt of 60 l. and 5 l. for Costs: And that he sued a Capias ad satisfaciendum against the said John Rogers; And notwithstanding he had not yet payed the condemnation, nor rendred his Body, Unde Actio accrevit, &c. The Defendant hereupon demurred: because this Action is brought against William Rogers only, whereas it ought to have been brought joyntly against him and Wood: For it is a joynt Bail, and not severall. Sed non allocatur. For the words uterque recognovit, &c. shew that it is a joynt and severall Bail, and the Action may be brought against the one solely. Secondly, for that it is not shewn that the writ was served, nor that it was returned,

(14)
Yelv. 52.

Post. 62.

nor

nor that the Plaintiff declared, nor how the Judgment was : But it was thereto answered ; That inasmuch as it is alledged, that both appeared at the day of Return, and that Taliter processum fuit, that the Plaintiff had recovered. It was sufficient, being but a Conveyance to the Action, and Collateral thereto. Vide 34 Hen. 6. 19 Hen. 6. And of that opinion was the whole Court. Thirdly, because it is not shewn that the Plaintiff gave warning of the Action brought, for the Reconusance is to appear within eight days after warning ; and if he were condemned in eodem placito that he should satisfy it, &c. So the Action which ought to charge the Sureties ought to be such whereupon Judgment is after warning : And if he appears without warning, and suffers a Recovery, it is not within the condition ; and it ought to be an actual warning by the Party, and the Sheriffs Summons is not sufficient ; as 11 Hen. 4. is, That upon a Covenant to levy a fine upon warning, It is not sufficient to shew that he was summoned by the Sheriff. Wherefore, &c. But it was thereto answered, that this condition stands upon two parts ; the one to appear within eight days after warning, the other if he be condemned in this Action, to pay the condemnation, or render himself to Prison, &c. which are distinct clauses ; And if the breach had been assigned upon the first, then warning ought to have been shewn : But it is admitted, that he appeared well enough as for the time ; And the breach is assigned upon the last clause, that being condemned he had not satisfied, &c. And therefore he need not shew any warning when he takes not any advantage of the first part ; And of that opinion were Fenner and Yelverton. But Gawdy, Williams and Popham held it to be a material exception, because it is as a condition precedent which first ought to be alledged to be performed ; And if he be condemned in any Action, where he appears without warning, It is not such an Action as is within the condition of the Reconusance, and the Bail is not answerable for it, being a stranger thereto. Wherefore for this cause rule was given, that Judgment should be entered for the Defendant. But by direction of the Court, the Action was discontinued ; And the Defendant appeared to a new Action.

Burser versus Martin, vel Purser versus Walter.

(15)
Yelv. 36.

T Respals : Quare Equum cepit a persona of the Plaintiff ; The Defendant pleaded Non culp. and found against him. And exception taken in arrest of Judgment, because he doth not say Equum suum, or that he was taken from the Plaintiffs possession ; For otherwise it may be that the Plaintiff had not any cause of Action, if he had not property or possession : And it may be, for any thing which appears in this Declaration, that he had not any of them ; wherefore the Declaration is not good : And
of

MOORE 451.
1 Cr. 544.

Yelv. 53.

Post. 97.

Yelv. 16.
Ante 11.
Post. 567.
Ante 43.
Pl. Com. 65. b.
Co. Lit. 303. a.
Post. 52. 98.
351. 630.

of that opinion were Gawdy, Fenner and Yelverton; and that the Declaration cannot be aided by intendment, but ought to be certain. But Popham and Williams *è contra*. Because it being alledged quod cepit a Persona, it is necessarily to be intended that he had possession. Wherefore, &c. But notwithstanding afterwards upon a second motion for the reasons aforesaid, It was adjudged for the Defendant.

Fisher *versus* Richardson Executor, &c. Hill. 1 Jac.
Rot. 732.

Assumpfit. For that the Testator being indebted unto him by single contract, the Defendant being Executor, and having Assets in his hands to satisfy all Debts and Legacies, assumed, that if he forbear to sue him until such a time, he would pay; And alledgeth in fact, that he forbore and had Assets, &c. And hereupon the Defendant demurred. Hedley argued for the Plaintiff; That inasmuch as the Testator was chargeable at the Common Law in an Assumpfit, (as hath been adjudged) the duty remains, although he be dead. And although no Action of Debt lies against the Executor, because the Testator might have waged his Law; Yet an Action upon the Case lies, with an averment of Assets to satisfy, as the Case is betwixt Norr. and Read; And if in this Case, Debt be brought against the Executor, if he pleads Non debet, he shall be charged; Therefore the staying of the Suit is sufficient consideration to ground this Action. And here he might have been sued in Chancery, the staying whereof is good cause of Assumpfit: Wherefore, &c. And of this opinion was the whole Court, without argument. Wherefore it was adjudged for the Plaintiff.

(16)
Yelv. 55.
I Cr. 187.
Post. 273. 397.

Webb *versus* Sir Henry Warner.

Prohibition. The Case was; That Sir Henry Warner libeled in the Spiritual Court, for Cythes of rough Hay growing in the Parishes and Fenny-Lands of Mildenhall: And the Plaintiff brought a Prohibition, surmising that there was 2200 Acres of Fenny-Land within the Parish, and 600 Acres of Medow; And that the Parishioners paid Cythe of Hay and Grain growing upon the Medow and Arable Land, and had paid 2 d. ob. for every Cow, and 1 d. for every Calf. And because they had not sufficient grass within the Parish to sustain their Beasts in Winter, they used to gather this Hay called Fenny fodder for the sustenance of their Beasts, for the better increase of their husbandry; and for this cause had been always freed from the payment of Cythes, &c. And it was hereupon demurred in Law; And after argument at the Bar adjudged for the Defendant, That this surmise was not sufficient; For one may not prescribe in Non Decimando; And in that it is alledged, they bestowed it upon

(17).
Moor 683.
Moor 683.
3 Cr. 195.

upon their Cattel there, &c. And for this cause did not pay Tythes, that is not any cause of discharge : For so they may prescribe for Corn spent in their Family ; or for Corn given for Probender to their Cattel, whereby no Tythes should be paid. Wherefore it was adjudged an ill surmise, and Consultation was awarded.

Barker *versus* Sir Nicholas Bacon.

(18)
Moor 754.
Yelv. 82.

Prohibition : To stay a Suit for Tythes ; The Case was upon Demurrer, That Queen Eliz. 37. Anno Regni sui granted by her Letters Patents to Sir Nicholas Bacon, Omnes & omnimodas Decimas granorum, herbagii, lactis, agnorum, vitulorum, &c. infra Dominicum de Bury Sancti Edmundi, ac etiam omnes alias decimas nuper Monasterio de Bury Sancti Edmundi. quondam spectant. & Quæ collectæ fuerunt per Eleemosynarium of the said Abbey. And by reason of this patent Sir Nicholas Bacon claimed the petty Tythes of Lambs, &c. in Bury ; And the Plaintiff claiming them by a second Patent from the Queen, averred that no Tythes were collected by the Almoner besides Tythes of Corn ; And whether the petit Tythes should pass by the first words, or be restrained by the last words, Et Quæ collectæ fuerunt per Eleemosynarium ; being averred and confessed by the Demurrer, That no Tythes were collected by the Almoner besides Tythes of Corn, was the Question. And after Argument at the Bar, it was resolved by the whole Court, that all Tythes infra Dominicum de Bury, passed by the first words, and they be not restrained by the second ; For they be granted particularly and indefinitely, and without restraint ; And therefore the restraint comes only to the last clause, which is general, ac omnes alias Decimas dicto Monasterio nuper spectant. and do not extend to the first clause, which comprehends in it self convenient certainty. And it is not like to the Cases of Hall and Pert, and Bozouns Case, reported by Mr. Attorney. For there the sentence being, Omnia illa Messuagia in tenura B. situat. in W. &c. Every part thereof ought to be true, otherwise nothing passed ; For Illa is not served until the end of the sentence, and it is all but one intire sentence, and no part thereof is vain : But here the sentences are distinct, and the restraint refers only to the last sentence, and this Case is the stronger : For that the second sentence is, Ac omnes alias decimas, which refers, that it is other than was intended to pass by the first sentence ; also it is more general than the first : For the first extend only to Tythes in Bury ; But the second is of all Tythes nuper pertinent. Monasterio de Bury, which is ubicunque ; And therefore hath that restraint, Et Quæ collectæ fuerunt per Eleemosynarium. Wherefore for these reasons it was adjudged for the Defendant. Vide 20 Ass. 8. 29 Ed. 3. 8. Dyer 87. & 3 & 4 Eliz. Dyer. Darrel and Wybarns Case.

Moor 755.

Post. 51.

Co. 2. 33. a.
Co. 4. 35. a.

Coke *versus* Bullock, Hill. 45 Eliz. Rot. 848.

T Respass. Upon a special Verdict, the Case was ; That Coke
 24 Eliz. devised his Land to his Sister in Fee : And 12 years
 after, let the same Land by Indenture to the said Sister for 60
 years to commence after his death, and delivered the Deed to a
 Stranger to the use of his Sister, which Stranger did not deliver
 it to the Sister, till after the death of the Devisor ; and she never
 agreed thereto, but claimed by the devise : And whether the making
 of this Lease was a Countermand of the Will or not, was the
 Question. Tanfield argued for the Plaintiff, that it was a good
 Countermand ; For it is to the same person to whom the devise
 was, and to begin at the same time, and so shews his intent to
 be altered ; which is a revocation : but peradventure if he had
 made a Lease to a stranger, or to begin presently, it had been other-
 wise : and a revocation may be by word, or by way of act. As if he
 makes a new Will without writing ; For that shews the alteration
 of his intent. Vide 3 & 4 Ph. & Ma. Dyer 143. & 14 Eliz. Dyer
 310. 44 Ed. 3. 33. Montague and Jefferies Case, 40 Eliz. Nichols
 & contra. For that it is not here an express, but an implicate revo-
 cation : And it may be, he gave her election to have the Fee or the
 term, because he delivered it to a stranger, and she agreed not
 thereto, as in the Case of a devise to one in Fee, and after in the
 same Will to another in Fee : they are Joyntenants, and it is not
 any revocation ; For his implied intent doth not appear to revoke
 it : no more doth his intent here : But to leave her at liberty.
 Wherefore, &c. But all the Court held, that it was a good revo-
 cation of the whole Estate : for both those Estates cannot stand
 in her to begin at one time, whereby his intent appears to be al-
 tered, and to give unto her a lesser Estate. But by all the Justices
 besides Walmesley ; if such a Lease had been made to a Stranger,
 it had not been any revocation but for the Term. But Walmesley
 held, that in regard it is an intire devise, it is a revocation for all :
 But the devise of a Mannor, and after a Lease, or a devise of part
 thereof to another, is no revocation for the residue ; For they are
 severall and may be severed : But in the principal Case they all
 agreed, that it is a revocation : For the Estates cannot stand toge-
 ther ; But if it had been made unto her to begin presently, or fu-
 turely in his life time ; That had not been any revocation : For it
 might have determined in his life, and have well stood with his
 Will. Wherefore it was adjudged for the Plaintiff.

(20)

Moor 429.
1 Rol. 616.3 Cr. 9.
Yelv. 210.
Pl. C. 451.
3 Cr. 9.1 Cr. 23.
3 Cr. 721.
Post. 691.
1 Rol. 616.

Hob. 2.

Bishop and Jurdain *versus* Vicountess Montague.

Pasch. 42 Eliz. Rot. 730.

(21)
3 Cr. 824.

TRESPASS upon the Case. *Sur Trover* upon a special Verdict, the Case was such: The Defendants Bailiff seized the Beasts for an Hariot, whereas there was not any due, whereto the Defendant agreed and converted them, whereupon the Action was brought; The sole question was, whether he ought to have this Action, or an Action of Trespass: For they all agreed, that Trespass lay by reason of her agreement, and it was argued by Foster for the Plaintiff, that this Action well lay; For it is at his election whether he will admit himself to be out of possession or not, for he might have had a Replevin if he would; and in this Action the *Trover* is not Craverfable, but the conversion only is material. Herne è contra, because the property is gone by the taking, so as he cannot dispose of them, 6 Hen. 7. And here the proper Action is Trespass: Wherefore, &c. Walmsley accord; for Trespass and *Trover* are contrary Actions: For it cannot be, that he should have property, and no property at one and the same time. And there is not here any word of the Writ true; for he hath not any property at the time of the conversion, 27 Aff. And of that opinion was Daniel: But Anderson, Walmsley and Kingmil è contra; And that he had election to bring either of the Actions at his pleasure. Wherefore it was adjudged for the Plaintiff.

Dyer 121. b.

Doctor Atkins *versus* Longvile, Trin. 44 Eliz. Rot. 518.

(22)
34 H. 8. c. 21.

TRESPASS. Upon a special Verdict, the Case was; King Hen. 8. seized of the Mannor of Bradwell, and of divers Lands in Bradwell, parcel of the Priory of Sheen: By Indenture under the great Seal, Bargains and Sells to Longvile the Mannor of Bradwell, and all his Lands in Bradwell, and covenants to make assurance by Patent under his great Seal rendering 51 s. Rent, Et Tenendum, by the tenth part of a Knights Fee, &c. Afterwards in 34 Hen. 8. The King by Patent under the great Seal grants to Longvile the Mannor of B. and all his Lands in B. & alibi in Comit. Buck. dicto Manerio spectant. Queen Elizabeth supposing that the Lands in B. which were not part of the Mannor had not passed, &c. granted them to Doctor Atkins; And whether they passed by the first Indenture, or second Patent, was the Question. And after argument, it was resolved for the Defendant, That they passed by the first Indenture; For although it was held that neither by the Common Law, nor by the Statute, 27 Hen. 8. Lands can pass from the King by Indenture of Bargain and Sale inrolled, because there cannot pass any use; For the King cannot
be

Moor 681.

be seised to an Use, as 5 Ed. 4. 7 Ed. 4. & Plowd. 238. Yet hereby appears, That the intent of the King was to pass it. And the Statute of 34 H. 8. makes all the Kings Grants by Patent or Indenture to be good, which otherwise were not good. Wherefore it is aided by this Statute. Also some of them held, That they passed by the last Patent; For when he granted the Mannor and all the Lands in B. Et alibi, &c. dicto Manerio spectant. Those words dicto Manerio spectant. Do not extend but to Lands alibi Ante 48. in dicto Comitatu. Buck. and they do not restrain the words ac omnia terr. in B. which are distinct by themselves, Wherefore it was adjudged for the Defendant.

Holloway versus Watkins.

Ejectione firmæ. For an House adjoining to Serjeants-Inn in Fleet-street, and depending upon the same Title: Upon a Special Verdict the Case was; the Dean and Chapter of York had devised unto them by one Dalby 400 l. to the intent to find a Chantery in their Church perpetually, and an Obit for the soul of Dalby, and that the Chantery Priest should have 48 Marks yearly, &c. King Hen. 4. granted Licence unto them to purchase those Houses in Fleet-street and other Land in York, ad onera & opera pietatis in the Will of Dalby mentioned to be performed; whereupon they purchased this land, and made Ordinances how that Priest should be maintained, and agreed with the Executors of Dalby for the finding him perpetually; and they confessed the receipt of the 400 l. devised unto them, and obliged themselves ac omnia bona sua ad performandum, &c. And it was found that the Dean and Chapter employed 8 l. for the maintenance of a Priest, and other Sums for the maintenance of an Obit. And that those Lands were in primo Ed. 6. certified to be employed for a Chantery; And the Statute of primo Ed. 6. was found, and the proviso therein for Deans and Chapters, &c. And that the King had it as Chantery Land, and gave it to Sir Edward Montague, &c. Under whom the Defendant claims. And the Dean and Chapter entered and let to the Plaintiff, And if, &c. And it was moved, That this was a Chantery in deed, or at least in reputation, and so given to the King. And of that opinion were Daniel and Warberton. For it appears, That the Lands were purchased for this cause and to this purpose, and a Priest maintained therewith. So as it is a Chantery in reputation, if it be not in fact; Nor were those Lands the proper possession of the Dean and Chapter within the Intent of the Proviso of the Statute, but their Possessions to this purpose Only; And therefore they are given to the King by the Statute of primo Edw. 6. But the other Justices e contra; Because there be not any Lands given by Dalby; And his intent cannot

make a Chantery; And the Dean and Chapter did not make any Chantery, nor appoint any Lands thereto, but oblige their goods for the payment of an annual Sum to a Priest, &c. And that Sum which was payed, was not payed out of the Land only, but out of all their possessions; And when no Lands certain are given to that purpose, nor employed for that purpose, it is not reason they should be given to the King. Wherefore it was adjudged for the Plaintiff.

Lodge *versus* Frye, Pasch. 2 Jac. Rot. 1347.

(24)

Replevin. Upon Demurrer, the Case was; That the Plaintiff in Bar to the Abowry shews that the Land was Copyhold Land grantable in possession or reversion for life, or in Fee, and that the Lord granted the reversion unto him after the death of W. who was Tenant for life, and shews the death of W. whereby he entered. And it was hereupon demurred: Because he did not shew the beginning of W. his estate, nor by whom W. had the estate granted him. And it was held to be no cause of Demurrer, because it is not the Plaintiffs Title, but matter of conveyance thereto: Wherefore it was adjudged for the Plaintiff.

Co. Lit. 503.b.
1 Cr. 571.
Post. 103.
Ant. 46.
Pl. Com. 148.b.

Bellingham *versus* Alfop, Pasch. 2 Jac. Rot. 1618.

(25)

27 H.3. c.16.
1 Vul. 960.1.

Ejectione firmæ. Upon a special verdict, The Case was, Tho. Fitzherbert being seised in Fee of Land by Indenture, dated 27. Feb. 38 Eliz. in consideration of money bargains and sells to Weeks and Hunt in Fee; who by Indenture dated 28. Feb. 38 Eliz. reciting, whereas Tho. Fitzherbert by Indenture inrolled 27. Feb. 38 Eliz. had sold unto them all such Lands, They in consideration of such a Sum of money bargained and sold to the said Tho. Fitzherbert and his Heirs of all their estate which they had by the said Indenture inrolled, of, in and to the said Lands; To have and to hold the said Lands to him and his Heirs: Afterward in 5. Martij, 38 Eliz. the first Indenture was inrolled; And afterward, 6. August. 38 Eliz. the second Indenture was inrolled: And under this second Indenture the Plaintiff claimed: And whether this second Indenture had well conveyed the Land, was the Question. And it was argued at the Bar and Bench: And Daniel and Kingmel held for the Plaintiff, That this Land was well conveyed: For when the first Indenture is inrolled; it being betwixt privies, shall have relation to the enfealing and delivery of the Deed; And by the judgment of the Act of Parliament, The Land is in the first Vendees ab initio to bargain, sell and dispose thereof: And the words in the second Indenture are apt enough to pass the Land. And although the first Indenture be not enrolled at the time of the second

2 Inst. 675.

1 Cr. 110.218.

second Indenture made, yet the Reciting thereof to be inrolled is not material. But Anderson and Warberton è contra: For it is against the Rule of the Common Law to pass that which a man hath not; And until the words of the Statute be performed, viz. That the Deed be inrolled, they have nothing at all, and therefore cannot pass it; as 7 Ed. 6. Two Joyntenants, The one bargains and sells all the land by Indenture, the other dies, so as he hath all by Survivor; The Deed is after inrolled, yet the moiety only shall pass. For nothing shall pass but that which he had at the time of the Sale: And here by this Indenture he passed nothing but that which he had by the Indenture inrolled: and he had nothing by any such Indenture inrolled, therefore nothing passed; For the Grant being general, and referring only to such lands which he had by Indenture inrolled (he not having any thing, &c.) nothing passed. And they held, That until the Deed be inrolled, the Estate and Freehold is in the Bargainor, and nothing passed from him. Walmley agreed, that the land did not pass, by reason of the misrecital of the said Deed to be inrolled, where there was not any such. But otherwise he held, the Land would well have passed; For he conceived the land to be in the Bargainor ab initio after the inrolment: Wherefore it was adjudged for the Defendant.

1 Cr. 110. 213.
Post. 409.
Co. 3. 29. a.
Hob. 136.

1 Cr. 217.
Co. Lit. 186.

1 Cr. 284. b.

The King *versus* the Bishop of Winton and Champion.

Quare Impedit, Of the Vicaridge of Newton Valence, and Counts; That King Ed. 6. was seised in Fe of the Advowson of the Vicaridge, in jure Coronæ, and that the Church became void by the death of the Incumbent. And that John Pescod Usurpando presented one Sanders. And that afterwards the Advowson descended to M. Mary, and so to M. Eliz. And that Sanders resigned. And afterwards Pescod, usurpando upon the Queen presented Selwith, who was Admitted, Instituted and Inducted: who resigned. And afterwards Pescod Usurpando presented one Taylor, who was Admitted, Instituted and Inducted, and afterwards deprived. And before any new presentation Queen Elizabeth died; And the King presented, and upon disturbance brought a Quare Impedit. And upon all this matter found by special Verdict, the sole Question was, whether a double usurpation shall bind the King, that he might not have a Quare Impedit, &c. Here for the Defendant argued, that it should. For a Patron hath but jus præsentandi, and not any interest: And it was resolved in Frenches Case, That where a Parson made a Lease for years, before the Statute of 13 Eliz. and after the 13 Eliz. the Patron confirms, and the Bishop, &c. It is good, and not within the Statute. And in this point, the King is not privileged more than a common person: For as it is necessary that the Church

(26)
Post. 123.
2 Rol. 37 t.

3 Cr. 18.

Church should be served: So it is as necessary that the King should not have a greater Priviledge than another, if he claim it in his own Right, 43 Ed. 3. 14. Stanford Prerogative, cap. 8. 18 Ed. 3. 16. & 21. and in 39 Eliz. It was adjudged where the Queen usurped upon a Purchasor, and after upon the next Avoidance, the Purchasor presented, That he was remitted; And 47 Ed. 3. 4. it is said expressly, That two Presentations put the King out of possession, and 38 Ed. 3. 3. And it was cited, that in 2 Ed. 2. & 10 Ed. 2. Latimers Case in a private book of Mr. Spencers the Custos Brevium, it was so resolved: And the Case of Pescod, 21 & 22 Eliz. Rot. 2218. was not against it. For there was not any Induction: Wherefore, &c. Anderson Chief Justice held strongly, that this double Usurpation shall not bind the King: For as he cannot be disseised of Land, no more may he be put out of possession of an Advowson: For it is a rule, That of things transitory the King may be put out of possession; But not of things permanent or from an Inheritance. And if the King had an Advowson for years, and after usurpation, the Church becomes void again, and disturbed; If the King might not maintain a Quare Impedit, He should be at a mischief; For he might not maintain *Droit de Advowson*: And no laches ought to prejudice the King. And as Patron might bring a Quare Impedit within the six months to remove any Incumbent; So the King may bring it any time: For Time shall not prejudice him: And in the Case which was begun, 21 Eliz. and adjudged, 25 Eliz. He was at the arguing thereof, and there the reason of the Judgment given, was, not for not alleging of the Induction, But because the Queen could not be put out of possession, by usurpation. And if a Presentation shall not put the King out of possession, Then twenty Presentations shall not bind him: Wherefore, &c. But Walmley, Kingsmill, Warberton and Daniel *contra*; For the King as to the Advowson, hath no greater priviledge than another person; For of necessity the Cure is to be served: And therefore the Law doth not give any priviledge to the King, to avoid the Incumbent who is in; more than to a Common person. And it differs from Land; for of land the King cannot put a man out of possession, nor can he be put out of possession thereof; so as therein the Law is equal: But of an Advowson, as he may gain the possession by a Presentation, so he may be put out of possession by two Presentations, as the Books before cited prove. And 18 Eliz. Dyer 351. And of Land the King hath the Profits, But of an Advowson he hath not any profits, so as it is Quasi a thing transitory unto him: Wherefore, &c. Afterwards in Pasch. 3 Jac. It being moved again, (absente Anderson) they gave judgment for the Defendant. And in this Case it was held by them all, If the King hath Title to present by Lapse, or by Out-lawry, or Wardship, and doth not present in his turn, he shall lose it.

Co. 6. 30. a.
Post. 123.

Co. 7. 28. a.
Post. 126.
3 Cr. 790. 44.
Post. 123.

Shopland

Shopland *versus* Ryoler, Trin. 1 Jac. Rot. 853.

R Eplevin. Upon Demurrer, the Case was, &c. Gardian in Soccage keeps Court in his own name and Grants Copies, &c. Whether such a Grant were good to bind the Heir, was the Question; And it was argued by Tanfield and Nichols for the Plaintiff that it was not good; Because a Guardian in Soccage is but a Bayly, and accountable for the profits, and hath not any certain interest, therefore he may not grant such Estates as shall bind the Heir. And he is Quasi as Tenant at Sufferance, who may not grant new Estates, nor present to Adowsons, nor meddle with things, but of such only whereof he may give an account to the Heir. Wherefore, &c. Hearn and Harris Jun. *è contra*; because a Gardian in Soccage is Dominus pro tempore, and shall have Livery, una cum exitibus, and hath an Estate to his own use, although to be accountable for the profits, and may maintain Actions in his own name; So he is more than a Bayly: Wherefore such Estates as are grantable by Custom, he may grant, &c. And because this was a new Case and concerned many; The Justices would not speak thereto, but adjourned it. Quod vide postea 98.

(27)
1 Rol. 499.
2 Rol. 41.

Richardson *versus* Dowel, Executor of Lany.

Hill. 1 Jac. Rot. 1403.

D Ebt. against him as Executor. The Defendant pleads plene Administravit, and Issue upon Assets: The Jury found that he Administred, and had Assets in Ireland: and whether that were Assets here, they prayed the discretion of the Court; And all the Court besides Walmley held, that it was well found, for they may find a thing in Ireland; and when they find that he had Assets, that is sufficient; and when they further say, in Ireland, it is idle and void: It was therefore adjudged for the Plaintiff.

(28)
Co. 6. 45. b.
Co. 6. 47. b.
Ante 17.
Post. 407. 503.
1 Cr. 76. 130.
212.

Termino

Termino Hillarii,

Anno secundo J A C O B I Regis in Banco Regis.

Sir John Harper *versus* Franc. Beamond.

(1)
Yelv. 57.
11th Jul. 329.

3 Cr. 191.

Yelv. 58.

Co. 4. 16. a.

Action upon the Case : Whereas he was a Justice of Peace, &c. That the Defendant spake these words of him, I am in danger of my life, my blood is sought, and I was like to have been murdered ; I was at Sir John Harpers House, and John Harper (the Son of the Plaintiff innuendo) drew me forth to see a Gelding in the Stable, and then Tho. Beamond, Sir Hen. Beamonds Son, did throw his Dagger at me twice, and thrust me through the Breeches twice with his Rapier to have killed me ; All this was done by the instigation of Sir John Harper, and I can prove it : The Defendant pleaded Non culp. and found against him, and Damages assessed to 100 l. And now moved in arrest of Judgment ; That an Action lies not for these words ; For he doth not charge the Plaintiff with any matter of Felony, but only an instigation, which is neither in the one or other but trespass only ; For reporting whereof no Action lies : And of that opinion were Popham and Yelverton. But Gawdy, Fenner and Williams e contra, That the Action well lies ; For being laid, That he is a Justice of Peace, &c. That instigation to do such an outrageous Act is against his Oath, and a great misdemeanor in him, for which he is to be fined and put out of Commission. And when he shews how he was in danger of his life, and like to be murdered, and shews the manner, and concludes, That all this was done by the instigation of Sir John Harper ; This shews the false and slanderous accusation of him, for which he is chargeable : Wherefore it was adjudged that the Action well lay, &c.

Curteis *versus* Wolverston, Hill. 45 Eliz. Rot. 817.

(2)

Trespas. Upon Demurrer, the Case was ; A Copyholder in fee of Lands descendable in Borough English had issue three Sons, and surrendered it to the use of his Will, and by his Will devised it to his middlemost Son in fee, upon Condition, That he would pay to his four Daughters, to every of them at their full age 20 l. and dies : The eldest Son hath two Daughters and dies : The middlemost Son is admitted, and doth not pay the said Sums at the full age of the said four Daughters : And the youngest Son enters in name of the two Daughters

Daughters of the eldest Son, and they dissent; And after he enters in his own name, and surrenders to the use of the Defendant, who being admitted, enters upon the middle Brother, who brings Trespass: The first Question was, whether it were a Condition, or a Limitation annexed to the Estate; For if it were a Condition, it goes to the Daughters of the eldest Son. Secondly, Admitting it were a Condition, whether it be broken or not, there being not any Demand alledged of any of the said 20 pounds by any of the four Daughters. And it was held by all the Justices, besides Williams, that it is a Condition; For it shall be expounded according to the Common Law, where it is not necessary to expound it to the contrary. But where a Devise is to an eldest Son upon such a Condition, if it should be expounded to be a Condition, it should be void and to no purpose; For it descends upon the eldest Son, and so should not bind him to perform it, and no redemption against him. And therefore the Law shall construe it to be a Limitation, and no Condition; which was the reason in Wellock and Hamonds Case. But here, there is not any such reason to construe it to be no Condition according to the words. Secondly, They resolved, That it was not broken without a Demand of those sums after their full age: For he is not bound of himself to take notice of their age, but after notice, ought to pay it; wherefore the Condition here is not broken: And if it be broken, he cannot enter for the Daughters without their express direction or appointment; For they have but a Title to enter, which a stranger without their Command cannot perform: And this point is clear, because they have disagreed to that entry made for them: wherefore the Entry of the youngest Son is not lawful. But Williams held that it was a Limitation; And that it shall go to the youngest Brother who is inheritable by the Custom: For otherwise he should be prejudiced, which the Law will not suffer: But notwithstanding for the reasons before given, it was adjudged for the Plaintiff.

Co. Lit. 379. a.

Co. 3. 20. 21. a.

1 Cr. 571.
Post. 243. 405.
Post. 102.

Cornwallis *versus* Spurling, Hill. 44 Eliz. Rot. 994.

DEbt. By the Parson of Grovel, Upon the Statute of 2 Ed. 6. for not setting out of Tythes; A special Verdict found, That those Lands whereof the Tythes are demanded were parcel of the Possession of the Templers, who were dissolved in the time of Ed. 2. And those Possessions by Act of Parliament 17 Ed. 2. were given and annexed to the Priory of St. John of Jerusalem with all privileges, &c. And it was found that the Templers had a Special Privilege, time whereof, to be discharged of Tythes of those Lands which propriis manibus excolunt: And it was found, that by Special Act of Parliament,

(3)

Co. 2. 46. b.

Post. 608.

Anno 32 H. 8. The possessions of the Priory of Saint John were given to the King by general words, of all Lands, Tenements, &c. In tam amplis modo & forma as the Abbot had them: And from the King those Lands came to the Defendant; And whether he should hold them discharged from the payment of Tythes as the Abbot had them, was the Question: And it was argued by Tanfield and others for the Defendant, and by Paget and others for the Plaintiff; And after Argument all the Court resolved, that he should not have the Priviledge to be discharged; For by the Common Law a Lay-person was not capable of such a Priviledge; And if such Lands had come to the King by the Relinquishment or Dissolution of any Monastery, The King should not have had the benefit of that Priviledge, until the Statute of 31 H. 8. And by that Statute is appointed, That all Monasteries, Abbeyes, &c. which before had come, or afterwards should come to the King, by Suppression, Surrender, &c. The King should have in such manner and form, &c. And that he should have them discharged from the payment of Tythes as Abbots, &c. So as the makers of that Law intended, that by the first clause, without the last, they should not hold them discharged, and therefore they added that Clause: But this Statute extends only to such Possessions which came to the King by Surrender, &c. and should be vested in him by force of the said Act; and doth not extend to Possessions which vested in him by another Act of Parliament, so not by the first; according to the Rule which is taken in Coke 2. fol. 46. in the Archbishop of Canterburies Case. And these Lands were here given to the King by a Special Act of Parliament, 32 H. 8. which hath the same words in the first Clause, as the Act of 31 H. 8. hath, but hath not the second; and therefore is no Cause of holding them discharged from Tythes: And so it was adjudged accordingly for the Plaintiff: And in this same Term a like Judgment was between the same parties in a Prohibition upon a Demurrer.

Sir John Hollis *versus* Briscow and his Wife,
Hill. 45 Eliz. Rot.

(4.)
Yelv. 64.

Action upon the Case: for words; Reciting, Whereas he was a Justice of Peace in the County of Nottingham, and had been Sheriff of the County, and then and for seven years before was a Deputy-Lieutenant there; that the Defendants wife said to Whittingham and Aston the Plaintiffs Servants, these words, Your Master (innuendo the Plaintiff) is a base Rascally Villain, and is neither Nobleman, Knight or Gentleman, but a most Villainous Rascal, and by unjust means doth most villainously take other mens Rights from them, and keeps a company of Thieves
and

and Traytors to do mischief, and giveth them nothing for their Labour but base Blew Liveries, and this all the Country reports; and other good he doth not any. The Defendants plead Not guilty, and found against them, and damages assessed to 20 l. And after Verdict it was moved in Arrest of Judgment, that these words be not actionable; For none of them (although they be ill words, and full of malice) have any colour to bear an Action, but these, And keeps a company of Thieves and Traytors to do mischief: And so was the opinion of all the Justices. And for these words no Action lies. For it may be, He keeps Thieves and Traytors, and knoweth them not to be such, and then it is not any slander. For one who hath many Servants may peradventure have such in his house, and knoweth not that they be so: and although that she said, To do mischief; That is not to commit Felony or Treason: And to do any other mischiefs, as to commit Riots or forceable Entries, or the like, import not any matter of slander: And therefore the words being such as may have a reasonable intendment, the Court shall not construe them to be slanderous, for which an Action should lie. Vide 6 Ed. 6. Dyer 75. Sir John Bridges Case, and 158 Barbers Case: And of this opinion were Gawdy, Fenner and Yelverton, that the words import not any slander, nor would bear an Action, but where by intendment they cannot have any favourable or reasonable Construction. But Popham and Williams held, That these words will maintain an Action. For being spoken maliciously, they shall be taken to have the worst intendment and the strongest against him that speaks them. But notwithstanding in regard of these others opinions, It was adjudged for the Defendant, Quod querens nihil capiat per billam.

Co. 4. 13. a.
3 Cr. 52.

Post. 268.

Post. 629.

Randal *versus* Wale.

ERROR. By an Infant, To Reverse a Judgment in Audita Querela in the Common Bench of a Recognisance acknowledged during his Nonage where he was inspected: And adjudged to be within age: And thereupon had a Scir. fac. against the Conusor; And upon a Nihil returned, It was adjudged that the Recognisance should be void, and he be discharged. Whereupon this Error brought: Because there ought to have been two Scire Facias, where a Nihil is returned upon a Scir. Fac. and a Scir. Feci returned: And for that cause the Judgment was Reversed: And it was now shewn; In regard the Conusor is at present of full age, and cannot have a new Writ of Audita Querela to be inspected, That he may have a new Writ comprehending the first Inspection and the Judgment thereupon, and the cause of rehearal thereof; and upon all the matter to pray

(5)
Yelv. 88.
F.N.B. 104. k. q.
Moor 460.

Yelv. 88.
1 Cr. 528.

Post. 231.
Co. Lit. 380. b.
3 Cr. 208.
Yelv. 88.

to be relieved : And so was the opinion of the Court. Wherefore they appointed that he might file a new Writ accordingly.

Saffyn *versus* Adams, Trin. 44 Eliz. Rot. 1242.

(6)

Co. 5. 123. b.

R Eplevin. Upon a special Verdict, the Case was such : The Abbot of B. made a Lease for years determinable upon the life of Kellmay, and afterwards in 29 Hen. 8. lets the Land for 80 years to begin after the determination of the first Term ; King Hen. 8. having afterwards the Reversion, grants it to Sentleger in Fee. The first Lease expires, Sentleger the Grantee of the Reversion enters, the second Lessee before entry Grants omnia bona & catalla in custodia seu possessione sua existentia, seu in custodia of any other. Afterwards before any entry by the second Lessee or his Grantee, Sentleger makes a Feoffment in Fee, and Levies a Fine with Proclamations ; The five years expire : The Question was, whether by this Fine this second Lease (which was but the Interest of a Term) be barred ; And it was resolved, (1.) That by this gift of omnia bona & catalla

Co. 5. 124. b.

4 H. 7. c. 24.

in custodia sua, &c. This Interest of the Term well passed. (2.) Walmley and Daniel held, that the Fine was not any Bar ; For although they all agreed, That if one hath a Term in possession, and be outed by him in Reversion, or a stranger, so that his Term is turned into a right : if a Fine with Proclamations be levied of the Land, and five years passed without Claim, that it shall bar ; Yet when a Term is to begin at a future day, Until the Lessee enters, he cannot be outed, and he is always quasi in possession, and it is well grantable over. And of that, whereof one is in possession as of Rent or Common, &c. a Fine shall never bind him ; and this point of the Interest of a Term was adjudged, Mich. 21 & 22 Eliz. in B. R. betwixt Sanders and Stanford ; That it was not barred by such a Fine : It was also said, That this Fine is of the Franktenement, and this Term is of another thing of another nature, and therefore not levied thereof ; And the Lessor did not any wrong by his Feoffment or Fine, and therefore there needed not any Claim, but it is always saved unto him : Wherefore they held that this Fine is not any Bar. But Anderson, Warberton and Kingsmill e contra : For the Statute extends to the Interest of a Term expressly ; For they be one equal mischief, as a sleeping Lease of a thousand years shall bind the Purchaser as well as a sleeping right or title ; And therefore there is as great reason to Bar it as any other right : And it is not like to Rent or Common : For a Term is an Interest in the Land, whereof the Fine is levied. But the others are collateral, and the Fine is not levied of them. But a Fine levied before the beginning of a Term shall not bind if he makes his Claim within five years after his Title comes

in

Co. 5. 123.

Co. 5. 124. a.
1 Cr. 110.
Co. 9. 105.
Pl. Com. 374.

in esse. But if he makes it not within five years after, he shall be barred: And whereas it was said that he is always in possession: That is not so; For he cannot maintain an Ejectione firmæ, or Trespass without Entry: And the Statute which mentions interest, especially extends thereto; For if he enters after the Term Commenced, and be ousted, then it is not any interest in him, but a right. And as to Stanfords Case, it was upon another reason; For there, he who had the future interest died, the first Term expired, the Lessor enters and levies a Fine with Proclamations before any Administration committed; The five years passed, and after Administration was granted, The Question was, whether the Administrator should have five years, and resolved that he should; For none had Title of Entry before, which differs much from this Case. And Warberton said, that he had seen the reading of Catlin; where he with divers others held, that such an interest is presently barred, if he doth not make his claim: Wherefore, &c. And afterwards, Pasch. 3 Jac. They gave Judgment accordingly (against the opinion of Walmesley and Daniel,) That the Fine was a Barr.

Loves *versus* Goddard, Trin. 2 Jac. Rot. 944.

T Respals. Upon a special Verdict, the Case was : Leonard Loves seized in Fee, devised it to Thomas Loves his eldest Son, and his Heirs males of his body, from and after his decease for five hundred years, upon this condition, he should allow all his Grants and Estates made by him, provided always, that if my said Son *Thomas*, or any Heir Male of his body, alien, give or grant the premises, or any part thereof otherwise than to Lease, Demise or Grant the same, or any part thereof to any person or persons, for any number of years as shall determine upon the deaths of any three persons, or upon the death of any four persons to be named within the same Lease, whereupon the old Rents shall be reserved. That then all the premises for default of such Issue males of the body of the said *Thomas Loves*, or so much thereof as shall be aliened, leased otherwise than as aforesaid, by the said *Thomas Loves* or any his Issue Males immediately upon every or any such alienation or Lease of the premises, or any part thereof, contrary to the true meaning of these presents shall remain and come to my Son *William Loves* and the Heirs Males of his body. Leonard Loves the Testator dies: Thomas Loves the Devisee enters and makes a Lease for a thousand years to Richard Baker, and dies without Issue Male having Issue Jane Goddard, the Defendant, who Entred, William Loves enters as in remainder devised unto him. And whether his Entry was lawful or no, was the Question : And after argument at the Barr by the Serjeants, it was argued Seriatim by all the Justices, who agreed, that it was an Estate Tail, and no Term ; For so it appears to be the intent of the

(7)
Moor 772.
Co. 10. 78. a.
79. a.

(9)
Moor 773.
Co. 10. 87. a.
1 Rol. 741.

Devisee

Deviloz, which ought to be maintained if it stands with Law ; For it is devised unto him and the Heirs Male of his body, and that if he died without Issue Male of his body, &c. that it should remain ; And the condition, that he should not alien, shews his intent : which being in a Will, all the words ought to be construed together, for the upholding the Devilozs intent : And therefore the words for 500 years are void, as Warberton and Anderson held in their arguments. But Daniel and Walmley said, that it shall not be merely void, but shall be construed to this purpose : That the Estate shall be determined when the 500 years are expired, viz. that they shall be Tenants in Tail for 500 years ; As an Estate Tail may be limited to continue for three Descents, as 39 Aff. is. Also, if it should not be construed to be an Estate Tail, but a Term, It should be extinguished by the Descent of the Inheritance ; which never was the intent of the Deviloz, That that which began by his death, should instantly be destroyed by his death. Wherefore being in a Will, there ought to be a favourable construction made for the upholding thereof, if not repugnant to Law : But if such a limitation had been in a Dêd, it had been but a Term. But Daniel, Kingmil and Anderson argued for the Defendant ; that William Loves had not any remainder : For it is not limited unto him, but upon a dying without Issue, and an alienation against the condition ; So it is a conditional limitation, which is void and repugnant, to make a remainder to commence after the alienation of an Entail : And Daniel held, that this Lease for 1000 years is not any breach of the condition ; Because being made by Tenant in Tail, it determines by his death : So as it is not to continue longer than the Estate, for it determines upon one life ; and of that opinion was Walmley in this point. But Warberton è contra herein ; for the limitation ought to be by the words of the condition, by the express words in the Lease : And because a life is to endure and not to be limited by many years, and to be determined by matter in Law, or ex post facto upon a life : That will not serve. But Walmley and Warberton held, that it is an express limitation of the Entail and of the Remainder expectant thereupon, and not to begin upon the alienation, as is pretended ; Wherefore the Estate Tail being spent, William Loves hath a good Estate in Remainder, and may maintain the Action. But notwithstanding their opinion, it was adjudged by the other three Justices for the Defendant : And a Writ of Error was brought thereof, &c.

Co. 10. 87. a.

Moor 773.

Moor 773.

Moor 773.

Moor 774.

Termino Paschæ,

Anno tertio JACOBI Regis in Banco Regis.

Farchild *versus* Gayre.

TRESPASS. Upon a special Verdict, the Case was; The Defendant being Incumbent of the Rectory of Bellu, being a Donative, (and Calmady and one Rich. Gayre having the Donation thereof;) made an Instrument, whereby he concessit & resignavit to Calmady, & omnibus ad quos in hac parte pertinet ad acceptandum Ecclesiam suam de Bellu prædict. And thereupon the two Patrons gave it to the Plaintiff, who being disturbed by the Defendant (who supposed this resignation to be void,) brought Trespass: And it was moved, whether the resignation of a Donative Church can be to the Donor; or how it might be departed with. And all the Court held, that this being a Donative, began only by the Foundation and Erection of the Donor, and he hath the sole visitation and correction, and the Ordinary nothing to do therewith: And as he comes in by him, so he may restore it to him. For unumquodque eodem modo quo colligatum est dissolvitur. And although the Presentee when he is in, hath the Freehold, yet he may revest it by his resignation without any other ceremony; and the Ordinary hath nothing to do therein. For Admission and Institution is not requisite in Case of a Donative: But if to such a Donative the Patron presents to the Ordinary, and suffers an admission and Institution thereupon, he thereby hath made it always presentable: wherefore the resignation here is good enough, and determines his incumbency. Secondly, It was moved, whether this resignation to one of the Founders only be good, and resolved that it was, For it enures to both, as a Surrender shall do, especially when they both consent thereto, and grant it de novo as here they did. Thirdly, It was moved by Doderidge, that this resignation is de Ecclesia; and here the action is brought for the Lands which passed

(1)
Yelv. 60.
Moor 765.
Co. Lit. 344. a.

Yelv. 60.
Moor 765.
Co. Lit. 344. d.

Co. Lit. 344. a.

Yelv. 61.
Post. 476.
Co. Lit. 192. a.

Yelv. 61.

Co. 9. 51. b.
Post. 164.
508.1 Cr. 22.
130. 392. 458.
Co. 5. 97. a.
Post. 437.
Post. 445.

passed not by such resignation, as if Lessee of a Manor will surrender the Seite of the Manor or Capital-house, the residue of the Manor passeth not. But all the Court held, that the resignation extends to all the possessions; For as the Donation to the Church extends to invest him with all the possessions; So the resignation thereof extends to all the possessions of the Church. And although it was objected, that it is not here found, that the Donors accepted of the resignation, and so there is not any resignation found; The Court held, that it being in a special Verdict, all necessary circumstances shall be intended: But because the Verdict concludes upon a precise point, that if the resignation be good, then they find for the Plaintiff, &c. The Court shall not doubt of more than the Jury doubted. Wherefore it was adjudged for the Plaintiff.

Deviis *versus* Clerk, Hill. 43 Eliz. Rot. 526.(2)
1 Rol. 224.Post. 426.
Co. 8. 60. a.
1 Cr. 564.1 Rol. 224.
Co. 8. 60. a.

ERror of a Judgment in the Kings Bench. The Error assigned; because, in Debt upon an obligation, the Defendant pleaded Non est factum, and afterwards relicta verificatione, confessed the Action; And the Judgment was in Misericordia, where it should be Capiatur; because he once denied his Debt; so he ought to be fined to the King: and of that opinion was Gawdy. Vide 33 Hen. 6. 9 Ed. 4. 12 Eliz. Dyer. But Fenner and Williams è contra; Because a Fine is not payable but where he denies his Debt, and it is found against him upon his false Plea, and the Jurors are troubled with the Trial thereof: There, for troubling the Kings Court, and for troubling the Country, and the falsity of his Plea, he shall be fined and imprisoned: But when it is not found against him, but he relinquisheth his Plea, he shall be only amerced; and so accordingly it was said, That the Presidents be in this Court, and in the Court of Common Pleas: Wherefore cæteris Justiciariis absentibus, The Judgment was affirmed accordingly.

Dolphin *versus* Clerk.(3)
Yelv. 64.Post. 162. 442.
458.
1 Cr. 38. 90.
3 Cr. 554.
Hob. 68.

Ejectione firmæ. After Verdict, Exception was taken in arrest of Judgment: That the Appearance and Issue were in Hillarii primo JACOBI; And the Bail was Crastino purificationis; and thereupon was the Declaration and Issue, and Ven. fac. awarded, bearing Date 23. Januar. 1 Jac. And upon this a Distringas 12. Februar. So as the Ven. fac. was awarded before the Appearance and Declaration to try the Issue in the same Action; which cannot be good. But the Court held, that it was amendable; For the Roll is the warrant of the Ven. fac. which being variant from it, the Teste whereof shall be amended, to be subsequent to the Issue joyned; And whereas the

Teste

Teste was 23. Januar. which was Sunday (so not dies Juridicus) Post. 496.
Dier 168.
It was held that it also should be amended, for it was but the default of the Clerk, and misawarding of the process, which is aided by the Statutes of 32 Hen. 8. & 18 Eliz. Wherefore notwithstanding these Directions, It was adjudged for the Plaintiff.

Sir George Moor *versus* Foster.

Action for words. Whereas such a Suit was depending in Chancery, betwixt the Defendant, and one King: And in that Suit a Commission was awarded to the Plaintiff, and to three others there named by the assent of the Parties, ad examinandum testes, & audiendum & terminandum, if they could, by the assent of the parties, and if they could not, to certify their doings, &c. That the Defendant said of the Plaintiff these words: Sir George Moor is a corrupt man, and hath taken Bribes of Rich. King (innuendo, That he hath taken Bribes of Rich. King for executing that Commission) & ulterius dixit, That Rich. King hath set Sir George Moor on horseback with his Bribes to pervert Justice and Equity. The Defendant pleaded Not guilty, and after Verdict, it was found for the Plaintiff and 100 l. Damages; And it was now moved in Arrest of Judgment, that an Action lay not for these words: For it is not shewn that he executed this Commission, or examined any Witnesses, or that he was sworn to execute any such Commission: And therefore he is not punishable if he mis-execute it, nor is it shewn that it was returned: And of that opinion was Williams, that the Action lies not, because he is but a voluntary Commissioner chosen by assent of the Parties, and but in nature of an Arbitrator, and is not any Judge, who hath taken any oath, nor any any publick Officer. But Popham, Gawdy, Fenner, and Yelverton, *contra*; For although he were not sworn to execute duely the said Commission, yet having the Kings Commission to execute, it is a matter wherewith he is intrusted: And if he takes Bribes for the executing thereof, it is a breach of the trust reposed in him, and is so great an offence as he may be Endicted and Fined by the Common Law, as Popham said. And they all held it to be such an offence for which he is punishable in the Star-Chamber, and deserves to be put out of every Commission; And there cannot be any greater slander to a person of reputation, than to affirm that he takes Bribes to pervert Justice and Equity. Wherefore it was adjudged for the Plaintiff. (4)
1 Rol. 56.
Yelv. 62.

Yelv. 62.
1 Rol. 56.

Co. 9. 71. a.

Robins *versus* Hildredon, Mich. 2 Jac. Rot.

Action for words, Thou art a Thievish Knave, and hast stollen my Wood: After Verdict for the Plaintiff upon Not guilty pleaded, and twenty marks Damages, it was moved that the (5)
Action

Post. 514. 535. Action lay not ; For the words Thievish Knave will not bear an Action, for it is but an Adjective to Knave ; and these words, Thou hast stolen my Wood, are not Actionable ; For stealing of Wood may be intended growing Wood, and then it is not any Felony, and so no cause of Action. But it was afterward moved again for the Plaintiff, that the Action was well brought ; For the words, Thou hast stolen my Wood, shall be intended and be taken in malam partem, that he stole Wood felled : For it is not Wood as long as it is growing : Also by the Statute, if one steals Wood which is growing, he is to be punished by whipping : For which cause it is a great slander ; And therefore, &c. And of that opinion were Fenner and Yelverton ; but Popham, Gawdy and Williams è contra : that the Action lies not. For although it be said, that he is a Thief ; it being coupled with the words subsequent, which expound it to be no Felony, those words will not maintain an Action : But if he had said, that he was a Thief generally without more, it would have been actionable ; And the words, And thou hast stolen my Wood ; is all one, as if he had said, For thou hast stolen my Wood, which is not Felony, unless it be shewn to be Wood felled, no more than if he had said, Thou hast stolen my Apples ; which are intended growing, &c. which cannot be felony, and then not actionable : Wherefore for the opinion of the three said Justices, It was adjudged for the Defendant, Postea.

Post. 114.
Hob. 77.

Ante 40.
Post. 166.
Post. 205.

Palmer *versus* Wilders, Pasch. 44 Eliz. Rot. 144.

(6)
Co. 5. 126. b.
Yelv. 59.
Co. 5. 127. a. b.
Yelv. 59.
1 Cr. 503.
Post. 151.
2 Cr. 335.

INtrusion. Maritagio non satisfacto: And doth not alledge any Tender: And it was thereupon demurred upon the Declaration, and all the Court (Gawdy absent) resolved without hearing of any argument, That for the value of the marriage, Tender is not requisite ; for it is due de mero Jure without any Tender, and the alledging of Tender is but surplusage, and gives colour to Traversers it, whereas it is not traversable. Vide the Earl of Pembroks Case. And Williams said, that he had known it to be so ruled in the Common Bench, and in the Exchequer ; Wherefore they gave rule to enter Judgment accordingly, unless, &c. And at another day Stephens moved to be heard to argue it for the Defendant ; And Gawdy said, that he much doubted thereof, by reason of the diversity of opinions in the Books concerning that Question. But because the other Justices had resolved it ; They without further argument adjudged it for the Plaintiff.

3 Cr. 468.

William Birton *versus* John Mandel.

DEbt against the Defendant, as Executor to J. S. The Defendant Pleads plene administravit, the Plaintiff replies, Et prædict. Willihelmus dicit quod prædict. Willielmus habet bona, &c. So mistakes William for John, And Issue joyned Et prædictus Johannes similiter. And the Verdict found for the Plaintiff. And it was now alledged in Arrest of Judgment, that by reason of this mispition, there is not any Issue joyned, and so a Repleader ought to be: But all the Court held, that it was but the Default of the Clerk, and amendable, and a good Verdict: Wherefore it was awarded to be amended, and adjudged for the Plaintiff.

(7)
Yelv. 65.
1 Cr. 80.

Ante 14.
Post. 502. 587.
Yelv. 65.
Hob. 117.
3 Cr. 435.

Worlich *versus* Massy, &c.

AUdita Querela. Upon Demurrer, the Case was, that one Edw. Barns was bound in a Statute to Worlich in 200 l. and being taken in Execution, brought an Audita Querela in Chancery, Surmising the said Statute to be void, by the Statute of Usury. Quod vid. ante fol. 25. And thereupon found four Sureties in Chancery, where every of them was bound in 200 l. That the said Edw. Barns should appear in Chancery at Octab. Mich. following, Et staret juri in ea parte prosecutur. cum effectu, to be levied of their Lands and Chattels if the said Edw. Barns appeared not at Octab. Mich. in form. prædicta & prosequeretur cum effectu. And upon this Surmise they were at Issue, and being sent unto the Kings Bench to be tried, it was afterwards there adjudged, that the Surmise was insufficient to discharge him; It was awarded, Quod nihil capiat per breve. And because he did not render himself to the Prison of the Kings Bench, nor pay the Condemnation: A Scire facias was brought upon this Recounance, declaring upon all this matter; And the breach assigned was, because he payed not this Condemnation, nor rendered himself to Prison, Et sic non stetit Juri, &c. And it was hereupon demurred: And Godfrey for the Defendant moved, That the breach was not well assigned; For the Reconuance being with a Condition in it self, he who will take advantage, ought to shew in his Action good Cause of Breach: But here the Reconuance is not, but for appearance, Et ad prosequend. cum effectu. And there is not any word, that he shall render himself, or pay the Condemnation. So as the Breach is assigned of matter dehors, and not warranted by the Reconuance; Wherefore it is not good: But it was thereto answered, and so all the Court resolved, That the Reconuance being ad comparandum & ad standum Juri, &c. It is intended according to the intention and course of the Court there, when one in Execution is

(8)
Yelv. 59.

1 Rol. 199.

Yelv. 60.
1 Rol. 336.
1 Cr. 64. 80.

Ante 45.

Co. 2. 16. b.

F.N.Br.105.

Ante 45.

delivered out of Prison upon such Sureties, it is not only to appear : But if he be condemned to satisfie the Condemnation, or to render himself to Prison, there to remain in Execution for the Debt : And of the Course of Chancery in such Case, it being one of the four principal Courts of Record in Westminster, other Courts ought to take notice ; and such exposition the words, Ad Standum Juri in hac parte, ought to have : For otherwise the party who hath Execution should be at mischief, if the Reconu- sance should be only ad comparandum & prosequendum cum effectu, which is only to prosecute without being Non-suited or using delay, which may be ; and yet he being condemned, the other shall not have any remedy for his Debt ; which is expressly against the intent of the Statute of 11 H. 6. cap. 10. which was made to remedy the mischief, that those in Execution should not be delivered out upon Sureties without good Sureties found to the party, at whose Suit he was in Execution to satisfie the Condemnation, if they should not discharge him, &c. The practice also since this Statute hath ever ben to find Sureties in this manner ad Standum Juri, which is intended to satisfie the Condemnation ; Wherefore the Breach is well assigned : And it was thereupon awarded, That Judgment should be entred for the Plaintiff, unless other matter were shewn, &c.

Sir Richard Champernon *versus* Hill, Hill. 2 Jac. Rot.

(6)
Moor 914.
Yelv. 63.

Post. 70. 330.
Yelv. 63.
Moor 914.
Post. 70.

DEbt upon the Statute of 2 Ed. 6. for not setting forth Tythes, and shews that two parts of the Tythes of the place, &c. appertained to the Rectory, and the third part to the Vicaridge ; And that he had a Lease for years of the Rectory, and another Lease of the Vicaridge ; and for not setting forth of the Tythes, he demanded according to the Statute, the treble value ; The Defendant pleaded Non debet, and found against him : And it was now alledged in Arrest of Judgment ; that in as much as his Cause of Action is grounded upon several Leases, he ought to have brought several Actions as his Title is several ; But the Court held that the Action was well brought, in regard he had both Titles in him, and he is to have the entire Tythes ; and this Action is brought upon the *Tort*, because he did not set out the Tythes : Wherefore it was adjudged for the Plaintiff.

Taylor *versus* Chambers, Trin. 2 Jac. Rot.

(10)
1 Rol. 113.

Action *Sur Trower*, of a silk Quilt, a Cessure of a Bed, five silk Curtains, a Peticoat and a Cloak. The Defendant Quoad all besides the two last, pleaded Not guilty ; Quoad them he pleaded, That the City of London is an ancient City, and that within the same is a Market every day for all goods to be sold in every

every part of the City, in every open Shop, every day besides Sundays and Holydays, betwixt Sun-rising and Sun-setting, so as one of the Contractors be a Freeman; And that he being a Freeman of the Company of Mercers, such a day not being Sunday or Holyday, bought those things in his open Shop, wherein he had a long time used to buy such Wares, of one Henry Cooper, for such a sum, and so justifies the Conversion; And upon this Plea the Plaintiff demurred: And upon the first motion at the Bar, all the Court conceived that the Plea was not good; For the Custom is too general, that every Freeman might buy all manner of wares in every Shop, &c. For then a Scrivener might buy Plate in his Shop, and the like, &c. which is not reasonable. And here he being of the mystery of Mercers, to buy Petticoats and Cloaks, &c. It is not agreeable to his Trade. And Popham said, that it had been resolved, that such Custom being found by a special Verdict, was unreasonable: Wherefore it was adjudged for the Plaintiff.

Co. 5. 83. b.

Egles *versus* Vale, Pasch. 1 Jac. Rot. 131.

Error of a Judgment given in Coventry in an Assumpsit: The first Error assigned was; For that the Plaintiff declares, Whereas the Plaintiff and Defendant 4 Mar. 43 Eliz. accounted together for divers sums of money received by the Defendant, And the Defendant was found to be in Arrearages 10 l. That the Defendant in consideratione inde assumed to pay that 10 l. the 19. of March following; and allegeth in fact, that he had not payed, &c. Whereupon he brought that action. Whereas there is not any consideration nor Cause to ground such an action: For the being found in Arrearages is not any Cause to make a special promise; Nor is there any thing done on the Plaintiffs part whereupon this promise should be grounded, viz. The forbearing of the Suit, or any such thing. Sed non allocatur; for the Debt it self without other special Cause is sufficient to ground the action. A second Error assigned, was, Because he declares ad damnum 10 l. and upon Non Assumpsit pleaded, the Jury assess Damages to 10 l. and Costs to 13 s. 4 d. So as the Damages and Costs assessed by the Jury exceed the Damages whereof the Plaintiff Counts; and Judgment is given accordingly: which is Error. Sed non allocatur; for although the Costs exceed the Damages, whereof the Plaintiff Counts, yet it is not Error: And although it were objected, that the Entry is always of Damages and Costs by the name of Damna, yet they be distinct: And although the Jury had found more Damages than the Plaintiff Counts, and Judgment had been given, that it had been Erroneous; yet in finding more Costs than the Damages amounted unto (for it may be that

(11)

Yelv. 70.
Post. 234.1 Cr. 116.
Yelv. 70.Yelv. 70.
1 Rol. 578.
Co. 10. 117. b.Co. 10. 116. b.
Post. 420.

Post. 297.

that the Costs of Suit through long dependance exceeded the Debt) It is not Error. Vide 13 H. 7. 16. 2 H. 6. 7. 42 Ed. 3. 7. A third Error assigned was, because the promise was 4. Martij, 43 Eliz. for the payment upon 19 Martij following, and the Action was brought 16 Martij, 43 Eliz. So it was brought three days before there was any cause of action: And this was held to be a manifest Error, and for this cause the Judgment was reversed. Mich. 3 Jac. Rot. 492. Reward *versus* Davie, accord of Judgment in the Common Bench, where the Judgment was affirmed, and Trin. 35 H. 8. Rot. 30. betwixt Wright and Whitfield accord.

1 Cr. 575.
Post. 561.
Yelv. 71.

Dagg and Kent *versus* Penkevon, Trin. 44 Eliz. Rot. 348.
In the Exchequer-Chamber.

(12)

DEbt. Upon the Stat. 2 Ed. 6. for not setting forth of Cythes, and demand the treble value of the Cythes, viz. 630. The Defendant pleaded Non debet, and the Jury found Quod debet 78 l. & Quoad residuum non debet, and assents 1 d. for Damages, and 40 s. for Costs; And the Plaintiff after divers motions in Arrest of Judgment had Judgment for the Debt, and released the Damages and Costs, because he was in doubt whether he ought to have had the Damages and Costs in this action wherein he recovered the treble value of the Cythes: And the Statute by the Express words doth not give Costs: Wherefore to avoid Error in hac parte he released the Damages and Costs, and took his Judgment for the Debt only: And Error was brought upon this Judgment in the Exchequer-Chamber. The first Error assigned was: For that the Plaintiff for his Title shews, that the Queen by her Letters Patents let the Rectory of M. to Ed. Prideux for life, and he let to the Plaintiff for years, &c. And he doth not say by Letters Patents hic in curia prolata; And this exception was taken before in the Kings Bench. Sed non allocatur: For inasmuch as the Plaintiff hath but parcel of the Estate, viz. A Lease derived out of a Lease for life; and because the Letters Patents do not appertain unto him; and for that this action is to punish a Tort, for not setting out of Cythes, and is not an action to demand the Cythes; and the Title shewn in the Declaration is but a conveyance to the action: Therefore the Declaration is good without shewing the Letters Patents. Secondly, it was alledged, That this Statute doth not give the treble value to the Farmor of a Parsonage. And that the Suit for the Forfeiture ought to be before the Spiritual Judge, and not at the Common Law. *Sed non allocatur. Thirdly, for that the action is brought by two Farmors, who demand the Forfeiture: for that he carried away the Corn without setting forth of the Cythes, not agreeing with them, being Farmors for the Corn: and he doth not say,

2 Inst. 651.
1 Cr. 560.

Dyer 29. b.
Co. 40. 92. a.
Post. 317.

Ant. 68.
Post. 328, 673.
Ante 43.

* 3 Cr. 608.
Ante 68.

say, that he did not agree with them, nor either of them: For if he agreed with any of them it sufficeth; Sed non allocatur: For when he saith, that he did not agree with them, it shall be intended, that he did not agree with them, nor either of them: And if he agreed with the one of them, the other ought to shew it: Wherefore the Judgment was affirmed.

1 Cr. 7. 4.
Ante 24.

Fish versus Bellamy, Mich. 2 Jac. Rot. 1906.

Replevin. The Defendant made Conuſance as Bailiff of Sir William Howard, for Damage-ſeſant, as in his freehold, &c. The Plaintiff ſhews, That the Biſhop of Bathe and Wells was ſeiſed in fee of the Mannor of Blackford, unde, &c. And in 18 H. 8. let it to Eliz. and Rob. Cozins for 60 years, with a Proviſo; That if they both died during the 60 years, that he might re-enter: the Leaſe is confirmed, &c. The Biſhop afterward dies, and one Tho. Clerk his ſucceſſor, 22 H. 8. (Eliz. Cozins being dead) let that Mannor to one Rob. Clerk, Habendum cum poſt mortem, five per mortem, ſurſum redditionem, ſeu foriſfacturam prædicti Rob. Cozins vacari acciderit, for 60 years, and this Leaſe is confirmed; Afterward the Reverſion of this Mannor is granted to Sir Will. Howard: Rob. Cozins dies during the 60 years: And whether this ſecond Leaſe ſhall take any effect, or be in contingency, or in eſſe, was the Queſtion. And it was argued by Foſter and Tanfield for the Defendant, That this ſecond Leaſe is not good; For, firſt, it was agreed by the Council on both ſides, and by all the Judges, That this firſt Term is not determined by the death of Eliz. Cozins and Rob. Cozins within the 60 years: but continues until the Leſſor or his Succeſſor determines it by Entry. For the proviſo is a meer condition, and not a limitation. Then when the ſecond Leaſe is limited to commence cum poſt mortem, five per mortem, ſurſum redditionem, foriſfacturam, vacari contigerit, none of them happen in this caſe: For it is not determined by death, nor is there any forfeiture, or any ſurrender: And therefore the ſecond Leaſe ſhall never have any beginning: For this Leaſe continues, until it be determined by effluſion of time: And the ſecond Leaſe is not appointed to begin after the determination of the firſt Leaſe: but after this ſpecial determination mentioned, which if it never happens, the ſecond Leaſe never ſhall begin: Wherefore, &c. And of that opinion were Anderſon and Kingſmil; That by reaſon of this uncertainty the Leaſe is void, for it doth not appear when it ſhould begin. But Walmsley, Warberton and Daniel è contra. For in Deeds ſuch conſtruction ought to be made, that they may well ſtand, according to the intent of the parties, and not to be deſtroyed: And it is a ſiniſter conſtruction which ſhall deſtroy that, which by any kind of conſtruction can be made good. And here it may be well conſtrued

(3)
Co. 6. 34. B.

Co. 6. 36. d.

Co. 6. 35. a.

Co. 6. 36. a.

Co. Lit. 45. b.

strued after the intent of the parties, That it shall begin when the first Term is determined by effluion of time post mortem of the Lessees, which may be at any time after the death of the parties, and needs not be immediately post mortem, For there be not any such words : Therefore there is a difference where a Remainder is limited post mortem, that ought to be immediately, without any interim. But otherwise it is when a Lease is appointed to commence cum vacari contigerit post mortem, &c. For then it shall begin ; quocunque modo or quandocunque vacar. contigerit post mortem, And so by such construction no estate shall be destroyed, but the intent of the parties is preserved : Wherefore they adjudged it for the Plaintiff, that the Lease was good.

Termino

Termino Trinitatis,

Anno tertio JACOBI Regis in Banco Regis.

Style *versus* Hearing.

Covenant. Upon a Demise by Indenture, and counts, (1)
 That the Defendant by Indenture demised, and granted ^{1 Rol. 520.}
 the Lands unto him for 20 years; And that one W. P. ^{871.}
 entred and evicted him by rightful Title: The Defen-
 dant pleads a Plea with an Inducement to a travers, absque hoc;
 That he was possed by vertue of a Lease, &c. And it was thereupon
 demurred: And resolved by all the Justices, that upon the words
 Demise and Grant, without other words which comprehend any
 Warrant in them, this Action well lies. And that a Lease by
 Estoppel is a good Lease to ground this Action upon Eviction.
 And that the Bar with a Travers that he was not possessed by ver-
 tue of a Lease, is no Plea against this Lease by Indenture, which ^{1 Rol. 874.}
 is an Estoppel, without shewing a particular cause: Wherefore
 without further argument, it was adjudged for the Plaintiff.

Ayre *versus* Aden.

Action *Sur Trover*, upon a special Verdict; The Case was (2)
 that a Sheriff upon a Fieri facias seized goods in his hands ^{1 Rol. 893.4.}
 to the value of the Debt, and payed part of the Debt; And the goods ^{Moor 757.}
 not being sold, nor the writ returned, the Sheriff was discharged ^{Yelv. 44.}
 of his Office; and afterwards sold the residue of the goods with-
 out any writ of Venditioni exponas. And whether this sale were ^{3 Cr. 209.}
 good or not, was the Question: And resolved that it was good; ^{Post. 515.}
 for the writ of Fieri fac. gave Authority unto him to sell, without ^{2 J. 47. 1 Gul. 320.}
 any other writ: And the sale by him after is good, although he ^{1 Rol. 893.}
 were discharged of his Office: Wherefore it was adjudged for the ^{Yelv. 44.}
 Defendant. ^{Moor 757.}
^{Yelv. 6.}

Brown *versus* Wootton, Hill. 2 Jac. Rot. 1099.

Action *sur Trover*, of certain Plate: The Defendant pleads, (3)
 That at another time the Plaintiff had brought his Action ^{Yelv. 67.}
 for this same Plate, against J. S. supposing the Conversion to ^{Moor 762.}
 have been by him. And in that Action had Judgment to re- ^{1 Cr. 75.}
 cover 20 l. for Damages, and had J. S. in Execution for those
 Damages; and avers, That it is for the same goods, and for the
 same

Post. 338.

Yelv. 67.
Moor 762.

same Trover and Conversion: And it was thereupon demurred. And after argument by Clerk for the Plaintiff, That it was not any Plea; Because they having Judgment, and the parties being in execution, is not any satisfaction, unless the money be payed: And then without satisfaction it is not any Plea in Bar of this Action: As in Debt against two by several Præcipes upon one obligation, Judgment and Execution against the one is no Plea for the other, without satisfaction. And Execution of the body is not any satisfaction, as 33 H. 6. 47. 4 H. 7. 29 H. 8. Title Execution. 132. 14 H. 4. But all the Court held the Plea to be good: For the cause of Action being against divers, for which Damages uncertain are recoverable: And he having Judgment against the one for Damages certain, That which was uncertain before is reduced in rem judicatam, and to certainty, which takes away the action against the others: And therefore Popham said, if one hath Judgment to recover in trespass against one, and damages certain, although he be not satisfied, yet he shall not have a new action for this trespass. By the same reason *è contra*, if one hath cause of action against two, and obtain Judgment against the one, he shall not have remedy against the other; And the alledging that he hath the one in execution for this cause, is not an Answer to the purpose: And the difference betwixt this Case and the Case of Debt upon an obligation against two, is, because there every of them is chargeable, and liable to the entire Debt; and therefore Recovery against the one is no Bar against the other until satisfaction. And Fenner said, that in case of Trespass, after the Judgment given, the property of the goods is changed, so as he may not seise them again: Wherefore by all the Court, *Nullo contradicente*, nor any of the Defendants Counsel being there, it was adjudged for the Defendant.

Horton *versus* Horton, Trin. 2 Jac. Rot. 710.

(4)
1 Rol. 844.
428. 9.

R Eplevin. Upon Demurrer the Case was; Wadham made a Lease for years of the Lands in question, upon condition that he should not alien to any besides his Children; The Lessor devise part of the Term to Humphry his Son after the death of his Feme, and made one Marshal, and another his Executors, and died; The Lessor entered as for a breach of the condition: And whether his entry were lawful was the Question: And it was argued by Gybbs for the Plaintiff, that it is a Forfeiture: For by this Devise to his Son after the death of his Feme, the Interest thereby is in the mean time given to the Feme; which is a breach of the Condition. But it was argued by Werre for the Defendant, That it was not any breach. First, the Devise to the Son after the death of his Feme is not any Devise to the Feme in the mean time: For the Law shall construe it

it to be a Devise to the *Feme* when the Law intends, that he intended it to his *Feme*, and to none other in the mean time. But here cannot be any such construction. For it may be well conceived, that he intended it to his Executors in the mean time. Secondly, the Law shall not construe it to be a Devise by implication, in destruction of an Estate, to make a breach of a condition: For no Tort is to be supposed by a construction in Law. Thirdly, that the Devise is void, unless it be shewn, that the Executors consented thereto, and that he entered by the Executors assent. For otherwise it cannot be a breach of the condition. Wherefore, *ec.* Popham, Gawdy and Yelverton held, that it was not a breach of the condition; For it is not a Devise to the *Feme* by implication: For if it should be by implication, it would make a forfeiture of the Estate. And this Devise of the Land to the Son, after the death of the *Feme*, is but a Demonstration when his estate shall commence, and in the interim the Executors may well have it: But Yelverton said, if the Devise had been to the Executors after the death of the *Feme*, That peradventure might by implication carry the Term to the *Feme*: For it appears, that his intent was, his Executors should not have it until after the *Femes* death; and none other could have it in the interim: Wherefore it shall be construed as a Devise unto her in the mean time. But Popham denied it; For in the mean time the Executors should not have it as Legatories, but to perform the Will. And it is a Demonstration when the Executors shall have it to their proper use: But they all agreed the Case of 13 H. 7. That a Devise to his Heir of his Land after the Death of his *Feme* is a good Devise by implication to the *Feme*: For it appears he intended his heir should not have it until the death of his *Feme*: And none other can have it besides the *Feme*. And therefore it is a good Devise to the *Feme* by implication. But if such a Devise had been to a stranger after the death of his *Feme*: it might peradventure have been otherwise: For the Heir in the interim might have had it: But they held, that if the Devise be allowed to be to the *Feme* by implication, although the Executor never assented thereto, yet it is a breach of the Condition; for he thereby made an alienation: And the Non-consenting of a stranger shall not take away the advantage which the Lessor had by this Act. So it was resolved in the Lord Burroughs Case in this point. Williams said, That he was of a contrary opinion in the principal Case: but he delivered not any reason: Wherefore Adjournatur.

1 Rol. 844.

Hob. 32.

1 Rol. 843.

Pl. Com. 521. d.

Moor 853.

3 Cr. 16.

Moor 7.

1 Rol. 428.

Higham *versus* Flower.

- (5) **D**Ebt: Upon an obligation dated apud Aloam: The Declarant supposed it to be made at Aloam in Suff. The Defendant pleaded, that Aloam is in Ireland; and that it is the same Till which is in the Bond; and that there is not any such Till nor place in England of that name; And demanded Judgment, &c. And it was thereupon demurred, and without argument adjudged for the Plaintiff: For although it bears date in any place beyond the Seas, yet the Plaintiff for Trial may alledge it to be made in England, and good enough. Vide 48 Ed. 3. 3.

Co. Lk. 261. b.

Baugh *versus* Haynes, Pasch. 43 Eliz. Rot. 80.

(6)
Co. 6. 37. a.
13 El. cap. 10.

Moor 759.
Co. 6. 37. b.
Co. Lit. 44. b.

Moor 759.

Co. 6. 38. a.
Co. Lit. 44. b.

TRespass. Upon a special Verdict, the Case was such: Dean and Chapter seised of a Manor whereof the Land in Question was Copyhold, demisable for three Lives, rendering 8 s. Rent at four feasts, and Hariotable upon the death of every Tenant dying in possession. The Dean and Chapter lets this land by Indenture for three lives, rendering 8 s. Rent at two feasts, and reserves not any Hariot: And whether this Lease were good against the succeeding Dean or not, was the Question. First, because this Lease was not made for three lives directly, but made to J. S. for the lives of his three Sons, named, &c. Secondly, because the Hariot is not reserved, so all the Services be not reserved. Thirdly, for that the Rent was usually payed at four days, and now it is reserved payable at two days. Fourthly, because this land was not usually demisable by Indenture, but only by Copy: And so it is not land usually demisable. But notwithstanding any of these objections, it was resolved, that this Lease was good: For as to the fourth objection, which seemeth to be the most material; It was held, that this Land is accounted usually demisable when it is always demised: As if usually it had been let at will at the Common Law rendering Rent, such land is said to be usually demised, and such Rent may be the ancient Rent; and so it was ruled in 7 Eliz. in the Case of Sir James Marvin, where Tenant in Tail lets a Copyhold by Indenture rendering the same Rent as before, that it was a good Lease within the Statute of 32 H. 8. And Williams said, that he had known it to have been thrice so adjudged in his time, in the Case of Tenant in Tail: And it was cited at the Bar, that this last Term in the Common Bench, betwixt Banks and Broman, It was so resolved by all the Justices in the Case of such a Lease by a Dean and Chapter. Secondly, it was resolved, That the non-reservation of the Hariot should not impeach the Lease; For the Statute is, that the ancient Rent and more shall be reserved; which

which is intended of the ancient Rents, and do not extend to casual and accidental services, as Parliots, and such like. To the third, that the relevation of the Rent was at two days, where it was usually paid before at four days: It was held to be well enough: for it is all for the Successors benefit, and there is not any impairing of the Rent: And as to the first objection, they all held, that it is not of any force: For a Lease to one for three lives, and to three for their three lives, is all one within the intent of the Statute: Wherefore upon the first argument, they all resolved, That it was a good Lease, and adjudged it for the Plaintiff.

Co. 6. 38. a.
Ante 26.
Co. Lit. 44. b.

Co. 6. 37. b.
Co. Lit. 44. b.

Brahford *versus* Buckingham and his Wife.

Error in the Exchequer-Chamber of a Judgment in the Kings Bench; The Error assigned was, Because the Action was brought by *Baron* and *Feme* upon a promise made to the *Feme* after the Coverture, in consideration that she should cure such a wound, to pay unto her 10 l. and alledges in fact, that she cured it: And for non-performance of this promise, they brought their Action upon the Case: where it was alledged, That the *Baron* sole should have had the Action, it being a personal duty which accrued during the Coverture. Sed non allocatur; Being grounded upon a promise made to the *Feme*, and upon a matter rising upon her skill, and upon a performance to be made by the person of the *Feme*: So she is the cause of the Action, and so the Action brought in both their names is well enough; and such an Action shall survive to the *Feme*. Wherefore the Judgment was affirmed.

1 Cr. 90.
Post. 205.

Earl of Bedford *versus* Forster, Pasch. 1 Jac. Rot. 426.

Error to reverse a Fine levied, Trin. 37 Eliz. by Sir John Forster. The first Error assigned was, because the writ was, Inter Nicholaum Forster querentem & Johannem Forster deforcientem; And so was the Dedimus potestatem: And in the caption of the fine annexed to the writ of Dedimus potestatem (which was certified,) it was in this manner; Præcipe Johanni Forster militi quod teneat Nicholao Forster, &c. So it varies from the first writ and Dedimus potestatem, &c. A second Error assigned was, because the writ of Covenant was, Præcipe, &c. Quod teneat, &c. de octo Messuagiis, duobus Toffis, decem gardinis, &c. So was the writ of Dedimus potestatem: And the fine certified was in this manner, Præcipe, &c. quod teneat, &c. de octo Messuagiis, duobus Messuagiis, decem gardinis, &c. So it varies from the first Writ or Commission, and there is not any warrant for the Commission. Thirdly, that upon the dole of the Dedimus potestatem it was, Executio istius Brevis patet in quodam pannello huic Brevi adnexo; whereas it ought to have been, in quadam

(8)
1 Rol. 794.

Fol. 354.

1 Rol. 794.

1 Rol. 794.

quadam scedula, huic Brevi annexa : For it is not any Panel, but a Scedule. But all the Court held, that none of these Errors assigned are any cause to reverse the Fine : For as to the first, they held, that the names are all one, Forster and Foster, and are of the same sound, Et quasi one and the same name ; And as to the last Error they held, That it is but matter of form, and not material. For although it be not properly said to be a Panel, yet a Panel and Scedule are all one in substance, and no cause to reverse it ; And as to the second Error, (Though it be the most colourable, yet) it is not any cause to reverse the Fine : For although duobus Messuagiis is, pro duobus Toftis, which seems to be prima facie more than the other, yet they held it not to be material. For the Concord hath relation to the Writ of Covenant and the Dedimus potestatem : And the Entry of the Præcipe upon the Teste of the Concord is a rehearsal of the substance of the Writ of Covenant, and is more than needs to be ; and being variant from the Writ of Covenant, is idle, immaterial, and merely void : Wherefore the Fine is good enough, notwithstanding these Exceptions. And it was affirmed.

Humphry Lea *versus* Lacon.

(9)
Yelv. 69.

TRêspas. After Verdict, it was moved in Arrest of Judgment ; That the Ven. fac. was awarded in this manner. Jacobus, &c. Vicecomiti salutem, &c. So omitting of what County he was Sheriff ; And it was returned by the Sheriff of the County of Salop, where the Action was brought : And now moved, that it was an ill Trial : And here is an ill Writ ; and it is not the want of a writ, which is not helped by the Statutes : Et non constat curiæ by what Sheriff of the County it is returned, nor by whom it is returnable : And the Sheriff of the County of Salop, hath no authority thereby to make the return, no more than any other Sheriff of any other County. But notwithstanding, because this writ is warranted by the Roll, which is well, it being judicial, may be amended ; Wherefore it was awarded to be amended, and the Plaintiff had Judgment.

Mary York *versus* Twine in the Court of Wards.

(10)

NOte, This Term it was resolved in the Court of Wards, betwixt Mary York and Twine, upon a Case made and delivered to the Judges, assistants to that Court, viz. Popham, Anderson and Fleming : That where the Queen had granted under her great Seal to one Allen an Annuity of 40 l. per annum for 21 years, to be payed by her Receiver of her Court of Wards ; Allen being condemned in 4000 l. Damages at the Suit of one Gilbert York, and that Verdict affirmed in an Attaint brought as well for the very matter as for the excessive Damages ;

Damages ; and Judgment begin given accordingly upon a *Fier. fac.*
This Annuity was sold to *George York* for 500 l. And whether this
Extent and Sale were good, was the Question. And they resolved, ^{Co. 7.}
That it was well extendable, and well sold by the Sheriff ; For be-
ing an Annuity certain, for years certain, and payable by the Re-
ceiver, It is in nature of a Rent-charge, for twenty one years, and is
well grantable over and vendible, and not like to an Annuity which
chargeth the person only.

Termino

Termino Michaelis,

Anno tertio JACOBI Regis in Banco Regis.

- (1) **M**emorandum. The first day of this Term, Sir Francis Gawdy, second Judge of the Kings Bench, was made and sworn Chief Justice of the Common Bench: (Sir Edm. Anderson dying the last Vacation) And all the Fellowship of the Inner-Temple attended him to the Hall the Saturday following; although it was doubted whether they ought to attend him, because he was before a Judge.

Vaughan *versus* Holdes.

- (2) **T**Respass. Upon Evidence the Case was: Infant Tenant in Tail of land in Gavelkind (where the custom was, that an Infant above the age of 15 years, might make a feoffment of his Land, and bind himself) made a feoffment of the Land intailed. The Question was, whether this feoffment were a discontinuance, and should bind the Infant: And all the Court held clearly, and so delivered the Law to the Jury; That this feoffment was not any discontinuance to bind him, nor was good by the custom; For the custom shall never enable him to do a Tort; And therefore shall be intended to extend only to Land whereof he is seised in Fee. And they further held, That if a man makes a Deed of feoffment of Land, and delivers the Deed, and saith no more; but Take and enjoy the Land, or Take the Land according to the Deed; or such words which amount to a Libery when he delivers the Deed; Nothing passeth: For the Law requireth more Ceremony than the delivery of the Deed upon the Land.

Co. Lit. 48. a.
Co. 5. 26. a.

Style *versus* Heath.

- (3) **A**ction upon the Case for words: Whereas the Plaintiff was Church-Warden of Marlow, and by reason of his office took his oath to present things within his charge: That he such a day and year, Vinculo Sacramenti sui prædict. presented certain Articles against the Defendant before the Official: And the Defendant knowing thereof, spake of the Plaintiff these words; Thou hast perjuredly presented me at the Visitation before J. S. Official. The Defendant pleaded Not guilty, and being found against him, It was moved in Arrest of Judgment by Finch; that for these words an Action lies not: First, be-
cause

Yelv. 72.
Post. 120.

cause the words, Thou didst perjuredly present me, &c. is no precise charge that he was perjured; But being adjectively spoken, they import not any such slander: As if one saith, Thou hast Thievishly taken such things; It is not any charge, that he is a Thief, nor is so slanderous; So if one saith, Thou hast dealt Traiterously, that doth not charge him to be a Traytor. Secondly, it is not shewn what thing he presented, so as it may appear to the Court, to be within his charge, and presentable by him; Otherwise, if he presents a thing wherewith he hath nothing to do, It is a vain presentation, and no perjury in him, &c. And for both causes, Williams and Yelverton held, that the Action lay not; For the reasons before alledged, Fenner said nothing thereto: Wherefore, and because the Postea was never returned, Judgment was appointed to be stayed Quousque it should be moved again. Afterward in Hill. Term it was moved again, Popham being present; And resolved that the Action lay not, and adjudged for the Defendant. Post. 499i
Vela 720
Post. 1202

..... *versus* Boucher.

FAux Imprisonment. The Defendant Justifies: For that the City of London is an ancient City; And that Sir Robert. Lee, being Major & Justiciarius pacis within the said City, commanded him being a Serjeant of the Peace, pro diversis causis eidem Majori bene cognitis to imprison the Plaintiff; Per quod, &c. and so Justifies; And it was thereupon demurred. The first exception was, because it was not shewn that the Major was Justice of Peace by Prescription, or by Charter. Secondly, because he justifies the Arrest by the Majors command, which being out of his presence, ought not to be without warrant; As 14 Hen. 7. is. Thirdly, because he justifies the Arrest by the Majors command, pro certis causis known to the Major; which is not good; For he ought to shew the cause of the imprisonment; So as the Court may adjudge, whether it were lawful or no: For otherwise, there is no cause of Justification. But Montague Recorder answered, That although such justification ought to be for the Major himself in such Case, because he ought to shew good cause of Justification to the Court, he being privy; yet the Serjeant or Officer is not privy, and therefore his authority is not to be examined upon his imprisoning any by the Majors Command. But all the Court held, That for this point principally the Plea is not good; For although the Major or Magistrate may send for any to examine him, and is not bound to shew the cause in his Warrant, nor the Officer is to know the cause; (For peradventure it may be for Treason or Felony, which if it should be discovered, the party might thereby escape; and the Examination should not be made, and Justice be thereby defrauded) Yet when he is come before the Major, and committed (4.)
1 Cr. 507.
552. 133.
Post. 219.

to prison, then the cause is discovered : And when one is impleaded in an Action, he ought to shew the cause, otherwise the Plea is not good : But for the other exceptions, they did not much regard them. And Judgment was given for the Plaintiff.

The King *versus* Sir Richard Wendman in the Exchequer.

(5) **I**T was held by all the Barons, and so they delivered the Law to the Jury ; That where Anthony Bowen had a Statute made unto him by Sir Rich. Wendman of 1000 l. and afterwards was a fugitive beyond the Seas in 27 Eliz. and after, before Office, returned, and released this Statute, and Office is afterwards found : That this release shall not bar the King ; For he was intitled by the flight, and the Office is but an informing of him, and the Statute was in him before the Office. Secondly, it was resolved, that the Queen granting the said Statute inter alia to Conway, and liberty unto him to sue it, in the name of the Queen and her Successors, it is a good Warrant, and all Process shall be made in the Kings name, as if there had not been any grant thereof ; Whereupon the Jury gave their Verdict accordingly.

Post. 180.

Davie Baker *versus* Gough.

(6) **T**he Plaintiff as Farmer to the Lord Abergavenny, brings the Action for certain Corn in the County of Oxon, for the trial of a Title of Land in the County of Monmouth ; The Parties being at Issue, and the Jury ready at the Bar to try it, The Defendant pleaded, that this Inquest ought not to be taken ; For that after the last continuance, and before Issue joyned, the foresaid Davie Baker was excommunicated ; Et profert the letters of the Bishop of Landaffe, Ordinary of the place where the Excommunication was, testifying it, And the Letters of Excommunication were entred upon the Plea, and bare date 4. Octob. 3 Jacobi, reciting that he was excommunicated for Recusancy ; whereupon the Plaintiff demurred : Because he doth not shew in the Plea, nor in the Letters, when he was excommunicated ; and peradventure, it might before the last be continuance, and then it is not any Plea : And of that opinion was Williams ; For every Plea dilatory, or in abatement, ought to be certain to every intent : But a Plea in Bar certain to a common intent is good ; And for this point, he relied upon 20 Hen. 6. 25. & 36 Hen. 6. where it is said, that the time of Excommungement ought to be shewn, for the reason abovesaid. Also it is not averred by the Plea, or otherwise, that Davie Baker, the Plaintiff, and this Baker who is named in this Excommungement, be one and the same person, and he doth not say prædict. And (Pop-
ham

ham absent) the other Justices would advise thereof; And the Jury was adjourned until the next day; when letters of absolution were shewn for the Plaintiff. But the Court held, that they were not sufficient, because they were after the Demurrer, and bare Teste after the Jury returned; Also for that they were under the Teste of the Archbishop; whereas it ought to have been under the Teste of the same Bishop who excommunicated him. But for the matter, all the Justices agreed; that the Plea was not good, for the reason before: Because the day of excommungement ought to be shewn certain to the Court, whereby the Court might adjudge thereupon, and the time is Traversable. And for the second Exception, Popham and Williams held it to be ill; But the other Justices doubted thereof: But upon the first point, it was resolved, that the Plea was ill: And thereupon, the Jury was taken, who found for the Plaintiff.

Co. Lit. 203. a.
Pl. Com. 33 b.

Jurdain versus Steere.

Ejectione firmæ. Upon a Lease by Richard Blackalley and Christopher Blackalley for three years of the entire Land; Upon Not guilty pleaded, The Case by the Evidence was discovered to be such: Christoph. and Rich. Blackalley, and one Waltham, Daughter to Rich. being Joyntenants for years; Waltham lets her part to Christoph. Afterwards Christoph. and Rich. joynt in this Lease to the Plaintiff; And he declares upon a joynt Lease by both, and whether this Declaration were good, was the Question. And Flemming Chief Baron (before whom it was tried by Nisi prius in the County of Devon) over-ruled it, that the Declaration was well maintained by this Lease: But notwithstanding, to satisfy the Defendants Counsel, caused the Case to be drawn up by the Counsel on both sides, and that it should be moved to the Court of Kings Bench, where the Case depended; And if they doubted thereof, then the Record should not be certified; And the Jury gave their Verdict according to his opinion for the Plaintiff; And now this matter was moved: And Popham and Fenner held, that this Lease well warrants the Declaration: For upon the matter, they both let the entire; and upon this general Count, it is good. But Yelverton and Williams è contra, Because the Court suppose that both let the entire, as Joyntenants, for so it is intended by the general Count, which appears to be false: For they two let two parts joyntly; and the one of them having a third part, as Tenant in common, let that only, and so the Declaration ought to have shewn the truth, and the especial matter: And because it is difficult, they use in such Case to make a Lease, and the Lessee to make a second Lease, and the second Lessee to declare generally; and so all the matter shall come in evidence. Wherefore Adjournatur.

(7)

Post. 166.

Gybson *versus* Searls.

(8)

Moor 774.

Post. 176.

Post. 177.

3 Cr. 522.

Co. 2. 17. a.
Co. 4. 31. b.3 Cr. 7.
Moor 185.

Ejectione firmæ. By the Plaintiff, Lessee of Richard Peacock against the Defendant Lessee of Gage; A special Verdict was found: But because it was very large, and many several Deds and Records were to be entred, and one point in Law (which was argued on both sides to be the Case) would make an end of all, by direction of the Court and consent of the parties a case was agreed to be made and argued, without entring the Verdict, and according to the resolution therein, Judgment should be entred: Which was such; Lessee of a Mannor for 99 years takes a Lease of the Bailiwick of the said Mannor for 21 years; And whether this taking of this Lease be a Surrender or determination of the first Lease of the Mannor was the Question; And it was argued by Doderidg the Kings Solicitor, for the Plaintiff, that it was not a Surrender; because it is of another thing, and of another nature, and may well stand with his Lease of the Mannor, and it doth not enable the Lessor to meddle with the Mannor during the first Term: But if he had taken a Grant of a Rent-Charge, or Common, or Estovers, or any parcel of the Mannor, by a new Grant, That had been a Surrender, as 21 H. 7. 6. is. And if he takes a Grant of the Custody of parcel thereof, That peradventure might have been a Surrender, as 3 Eliz. Dy. 200. is, for he had there a new interest in the same thing; But a Bailiwick may well stand with the other; For he shall have this disposing of his own Rent, and other priviledges which a Lessee hath not. Wherefore, &c. But Coke Attorney-General *contra*. For being agreed, That if he take the Custody, it is a Surrender; much more it is so when he is made Bailly; For a Bailly hath greater interest and authority to meddle, than he who hath a custody, as appears, 10 H. 7. 21. And it is a Rule, Quando aliquis per chartam aliquid accipit, omnia fecisse videtur sine quo res esse non potuit, as 14 H. 8. 15. 37 H. 6. 17. If the Lessee for years takes a new Lease for a lesser Term, it is a Surrender of the first: And Mich. 37 Eliz. in the Common Bench in Jeffes Case, it was adjudged, where Lessee for 60 years takes a new Lease to begin 10 years after, it was adjudged to be a Surrender presently, and Mich. 44 & 45 Eliz. in the Common Bench in Quare Impedit, against Thompson, where Lessee for years of an Adowson, was presented to the Adowson by the Lessor; It was adjudged to be a Surrender of his Term. And it hath been adjudged that if a Coppyholder in Fee takes a Lease for years of the same Land, it is an extinguishment of his Coppyhold in perpetuum: But if he takes a Lease for years of the Mannor, that is but a suspension of his Coppyhold during the Term. Fitz. Nat. Br. 154. If a Coroner be made Sheriff, it determines his Office of Coroner: And a Bailiff hath an

an Interest in the Mannor, to make a Lease at will, as 2 Ed. 4. 4.
3 H. 4. 1. Wherefore, Et Adjournatur. Vide post. fol. 176.

Kenn versus Drake.

INformation upon the Statute of 5 Eliz. because he used the Trade of a Spurrier in London, not having been Apprentice in that Trade, by the space of seven years: After Verdict Exception was taken; Because by the Statute of 31 Eliz. The information ought to have been brought before the Justices of Peace, where the Offence was committed, and cannot be brought here, nor in other of the Kings Courts: And of that opinion were Fenner, Yelverton and Williams: But they would advise, because it was a common Case, and concerned many Informations. (5)
13 El. cap 5.
1 Cr. 347.
Post. 179. 532.

Sir John Ashburnham versus the Lord St. John.

Audita Querela. To avoid an extent upon a Statute made by the Plaintiffs Father: The Extent being in the time of the Heir, supposing the Land to be entailed, and so not extendable. The Defendant takes Issue, that they descended unto him in fee, and Traverses the Tail: And Issue being joyned thereupon, it was found; That all was Fee-simple besides 500 Acres, &c. Upon this the Plaintiff prays to be discharged for those 500 Acres: And for that the Issue which was tendered by the Plaintiff, was, whether all those Lands were entailed; it being found in part against him, it is all one, as if all had been found against him who tendered it: and the finding of part to be entailed is not material, nor shall help him: But in this Case the Extent is void, and he may help himself by Entry, and have an Assise upon Disseisin. And all the Court held, that the Issue ought to be found for the Plaintiff, as he hath pleaded in every part, otherwise it is found against the Plaintiff in all; Wherefore it was adjudged, that the Plaintiff should take nothing by his Writ. (10)
1 Rol. 305.
2 Rol. 704.
2 Rol. 704.
1 Rol. 305.
Post. 183.
Hob. 119.

Blunden versus Wood.

Error of a Judgment in the Common Bench in Debt upon an obligation, where the Defendant pleaded, That he delivered it to the Plaintiff as an Escrow to be his Debt upon a Condition to be performed, which was not performed, and so not his Debt. The Plaintiff replies, That it was delivered absolutely as his Debt, and not as an Escrow, nor upon any Condition; And thereupon they were at Issue, and found for the Plaintiff, and Judgment given upon the Verdict, and Error there. (11)
2 Rol. 25.

thereof brought and assigned upon the body of the Record: For it was surmised, that it was not any Plea nor Issue; and so the Judgment ought to have been upon the confession, and not upon the Verdict, and therefore Erroneous: And Williams said, That the Plea was not good, to say, that the Obligation was delivered to the party himself as an Escrow: But yet being pleaded and admitted for good, and Issue being joyned, and found false, the Verdict is good enough, and the Judgment well given. As where payment is pleaded in Debt upon a Bill without acquittance, it being admitted and tried against him who pleaded it; The Trial is good, and Judgment shall be thereupon: And of that opinion was the whole Court; Wherefore the Judgment was affirmed: But nothing was spoken by the other Justices, whether the Plea were good or not.

Lapworth *versus* Wast.

(12)
Yelv. 77.

TRESPASS. For the taking of 20 loads of Wheat, &c. in Eythorp: The Defendant pleads to all the Trespasses, besides two loads, Not guilty; Quoad them he pleads, That the Will of Eythorp is within the Parish of Wapenbury, and that Tho. Lapworth was seised in Fee of the Rectory of Wapenbury, and devised it by his Will in writing to the Defendant in Fee, and died, and that the Defendant entered; and that the Corn was the Tythes severed, &c. So justifies: The Plaintiff, protestando, that Eythorp is not within the Parish of Wapenbury, pro placito dicit, that Tho. Lapworth was seised of the Rectory in Fee, and thereof died seised without Issue; which descended to the Plaintiff as his Cousin and Heir: Whereupon he entered, &c. and traidersteth the Devise; and thereupon they were at Issue: And a Ven. fac. awarded to try those two Issues, de vicineto parochiæ de Wapenbury: And the Jury found the Issue of Non culp. for the Defendant, and the other Issue for the Plaintiff; and it was hereupon alledged in Arrest of Judgment; first, that the replication was not good, because he doth not shew how Cousin: And although it were but an inducement to the Traversers, yet it ought to be always good in substance, as 12 Ed. 4. is: Sed non allocatur. For it being an Action of Trespass is well maintainable by reason of the possession, without making any Title in it. And although the Title which he makes in it, being but an inducement to the Traversers, is not formal: It is not material: For it is not Traversable. Secondly, It was alledged, that this Ven. fac. de vicineto parochiæ Wapenb. only, is misawarded: For it ought to be as well de Eythorp as of Wapenb. For where there be two Issues rising from both places, the Trial ought to be per vicinetum of both places; and being otherwise, it is a mis-trial, and not aided by any Statute: But Nichols Serjeant moved, That it was good enough: For although the

3 Cr. 884.
2 Rol. 26.
Co. 9. 137. a.
Co. Lit. 36. a.

1 Cr. 25. 54. 78.
Co. 5. 43. a.
Post. 377. 679.
3 Cr. 554.

Post. 161.

Ante 43.
1 Cr. 138.
Post. 123. 673.

Ante 8.
Post. 95.
Hob. 37.
3 Cr. 114.

the Plaintiff in the Declaration supposeth Eythorp to be, and doth not shew it to be within the Parish of Wapenb. yet the Defendant by his Plea confesseth it to be within the same Parish, and entitles himself thereto as parcel of the Rectory, wherefore it so appeareth to the Court; And then the Ven. fac. is well awarded from the vicinet. of the Parish. The Issue also, by the Not guilty pleaded, is found for the Defendant: Wherefore if it were not otherwise good, it is good enough by the Verdict; for it is not prejudiced thereby: Popham quoad the first reason; although the Defendant in the one part of his Plea confesseth that Eythorp is within the Parish of Wapenb. yet that shall not help this Trial; for the first Plea of Not guilty is distinct by it self, and the Issue is joyned upon it; So there is quasi an end thereof. The second part of the Plea is also distinct from the first, and hath not any relation thereto, and nothing which is therein shall aid the Plaintiff, quoad the Trial of the first; But they be as several Pleas to several Actions: But peradventure such a confession in one entire Plea would have helped him: But as it is, it is not good; And of that opinion were Fenner and Williams. And although the Defendant is found Not guilty, as to this Issue, yet that doth not help; For being a mistrial, it is as a void Trial of that Issue: And quoad that point, all the Court agreed, But for the first point Yelverton doubted: yet notwithstanding, by the assent of the whole Court, It was adjudged afterward to be a mistrial, and a Ven. fac. de novo was awarded, to try the same Issues.

Hob. 37.

Yelv. 77.

Myn versus Cole.

TRespals, For entring into his house, and taking of his goods. (13)
 The Defendant pleads, quoad the goods, Not guilty; Quoad the entry into the house, that the Plaintiffs Daughter licenced him, &c. And that he entred by that licence. The Plaintiff saith, Quod non intravit per licentiam suam. And Issue joyned thereupon: And for the first Issue found for the Defendant; And for the second Issue found for the Plaintiff: That he did not enter by licence, and Damages assessed to 80 l. Whereupon it was moved in Arrest of Judgment, that he ought to have traversed the licence, and not the entry by the licence: For that is pregnant in it self, and an ill Issue; And he ought to have traversed the entry by it self, or the licence by it self, and not both together; And of that opinion were Williams and Yelverton. Vide 10 Ed. 4. 14 H. 4. 32. Popham agreed, that the Issue was ill, if it had been at the Common Law; But being tried, it is made good by the Statute of 32 H. 8. which aids misjoyning of Issues; For an Issue upon a Negative pregnant is an Issue; per quod Adjournatur.

Post. 111. 221.
312. 560.

Draper *versus* Rastal, Pasch. 44 Eliz. Rot.

(14)

Yelv. 80.
Moor 775.
Post. 618.

DEbt, for 39 l. 12 s. in the Debet and detinet; For that he sold these Northern Clothes for 66 l. monetæ Flandriæ at tunc current in Middleburgh, Quæ quidem 66 l. monetæ Flandriæ tempore emptionis, &c. amounted to 39 l. 12 s. monetæ Angliæ, solvend. upon request; And that he had not payed the 39 l. 12 s. unde Actio, &c. The Defendant pleaded Non debet, and found for the Plaintiff Quod debet, and Damages assessed to 12 d. and Costs to 53 s. 4 d. And it was moved in Arrest of Judgment, that the Declaration was not good: For he ought to have made his demand according to his Contract, viz. 66 l. monetæ Flandriæ attingent to so much of English money: For otherwise if he demand so much English money, it doth not appear to the Court, but that it may be more than so much of Flanders money will amount unto; And if he should have Judgment according to his demand, the Defendant might be prejudiced: For he cannot traverse the value alledged. Also the Jury upon the Trial ought to have inquired of the value of the money; so as the Court might know how to give certain Judgment. And although in Original Writs pursued out of Chancery, The course is to demand so much of English money, that is, Because they have another form in the Chancery; yet in such Cases the Declaration ought to be special to demand so much of Flemish money, amounting to so much of English money; And the Judgment shall be according to the Declaration, to recover the money as he declares vel valorem inde, which shall be tried by a Jury what it is. Vide 9 Ed. 4. 49. 34 H. 6. 12. & 11 H. 7. 5. where Debt was brought for five Quarters frumenti ad valorem five Marks; The Judgment was to recover frumentum, or the value, 21 Ed. 4. 38. Book of Entry, fol. 157. & 37. & 38 Eliz. Rot. 524. in B. R. betwixt Bagshaw and Playn, where Debt was brought for 48 l. 8 s. monetæ Flandriæ, attingent to 40 l. 2 s. English money, against an Executor: He pleaded plene administravit, and found against him: The Judgment was, that the Plaintiff should recover debitum predictum: And Error being brought in the Exchequer Chamber, Judgment was there Reversed; because the Jury did not inquire of the value of the Flemish money, nor that a Writ was awarded to inquire of the value: and the Court might not know the value; And they would not believe the surmise of the party: But notwithstanding these Reasons, The Court gave Judgment for the Plaintiff. For they held no difference betwixt an Action brought by Original Writ, and by a Bill; But in both, The Plaintiff shall demand the Sum according to the English money. And if he demands it otherwise,

3 Cr. 536.

3 Cr. 536.

Yelv. 80.

Moor 775.

wife then it is in truth, The Defendant may therein plead in abatement, and so help himself. And the Verdict having found that he owed so much as he demanded, there ought not to be any further inquiry of the value: Wherefore it was adjudged for the Plaintiff.

Sir Francis Knowls *versus* Beckingshaw.

Error of a Judgment in the Common Bench, in Action *sur Trover*. The Error assigned was; for that the Action being brought in the time of Q. Eliz. and the parties then at Issue, and a Ven. fac. returned; Afterward in this Kings time an Hab. corpora was awarded with a Tales, which recited, Quod habeat corpora Jurator. summonit. in Curia nuper Regis. And because the Juroes were never said to be summoned in G. Regis (for the Ven. fac. was the first Process, which is not any Summons) it was therefore for this cause held to be Error, and the Judgment reversed, although this Error was in Judicial Process, and it is not aided by the Statute of Jeofails 32 H. 8. nor 18 Eliz. for the one Process ought to warrant the other, which was not done here; for it cannot warrant this Tales: Wherefore it was reversed.

(15)

1 Rol. 199.

Post. 161.

1 Rol. 199.

1 Cr. 99.

Sir Michel Dormer *versus* Chambers.

Error of a Judgment in the Common Bench in Debt: The Error assigned, for that the Plaintiff sued as Administrator: And in the first Declaration it is not expressed by whom the Administration was committed; but a blank was let therein for the name of the Ordinary; wherein the Defendant Imparled: And after the Imparance the Plaintiff declared de novo, as the course is in the Common Bench; And in that, the said fault was amended, and the Declaration made perfect; And the Defendant pleaded to Issue, and found against him, and Judgment accordingly: And it was held by Fenner and Yelverton to be Error. For the first Declaration is the material Declaration, and Judgment is given thereupon; and the second is but of form: And the first being ill, is not aided by the second; But if the first were good, and the second ill, it should be amended: because it is but the Default of the Clerk in not making it according to the former. Williams held, That the second Declaration being good, the pleading is upon it, and the Judgment good. And the first is, as if there had not been any Declaration at all. So it was adjudged in this Court, Where the first Declaration was in Debt upon an Obligation, 5. Feb. and the second was upon an Obligation Dated 15. Feb. and the Pleading and Judgment was thereupon, and Error thereof brought, That it was good, and, the

(16)

Ante 10.

Post. 105.

Post. 105.

R

Judg.

Judgment affirmed: For it was held as a Declaration without an Original, which being after Verdict, was aided: So here; Wherefore Adjournatur.

Kemp versus Houfgoe.

(17)
1 Rol. 87.

1 Cr. 223.

Action upon the Case; Whereas he being a Justice of Peace, &c. The Defendant spake of him these words, Master Kemp is a Basket-Justice, a partial Justice, I will give him five pounds every year for his Gifts, for Justice-matters: After Verdict for the Plaintiff, Exception was taken in Arrest of Judgment; That for these words an Action lies not: But Fenner and Williams being only there, held, that for none of the words besides the words partial Justice, any Action lies: For one may take presents of victuals without offence: But the words partial Justice touch him in his Office, and is quasi a corruption in him; and for them the Action lies.

Brook versus Sir Hen. Montague Recorder of London,
Trin. 3 Jac. Rot.

(18)

1 Rol. 87.
Moor 428.
Hob. 328.
Post. 432.

Hob. 328.

Action for words; For that the Defendant at such a place in Surrey spake these words of the Plaintiff, That he was arraigned and convicted of Felony, &c. The Defendant pleads, that the Plaintiff at another time brought false Imprisonment against J. S. one of the Serjeants of London, who justified by Warrant from Sir Nic. Mosely Mayor of London, for arresting him to find sureties for the good behaviour; And they were thereupon at Issue, and found against the Plaintiff, who brought an Attaint; And the Defendant being consiliarius & peritus in lege, was retained to be of Counsel with the Petty Jury; And in Evidence at the Trial in London, spake those words in the Declaration, and so Justifies; And Yelverton and Coke Attorney-General being of Counsel for the Defendant: The Court resolved, That the Justification was good: For a Counsellor in Law retained, hath a Priviledge to enforce any thing, which is informed him by his Client, and to give it in evidence, it being pertinent to the matter in Question, and not to examine whether it be true or false; but it is at the peril of him who informs it; For a Counsellor is at his peril to give in Evidence that which his Client informs him, being pertinent to the matter in Question; otherwise Action upon the Case lies against him by his Client, as Popham said: But matter not pertinent to the Issue, or the matter in Question, he need not to deliver: For he is to discern in his discretion what he is to deliver, and what not: And although it be false, he is excusable, being pertinent to the
mat-

matter : But if he give in Evidence any thing not material to the Issue, which is scandalous ; He ought to aver it to be true, otherwise he is punishable : For it shall be intended as spoken maliciously and without cause ; which is a good ground for an Action. So if a Counsellor object matter against a witness which is slanderous : If there be cause to discredit his testimony, and it be pertinent to the matter in Question, It is justifiable what he delivers by Information, although it be false : so here it is material Evidence to prove him a person fit to be bound to his good behaviour, and in maintenance of the first Verdict ; Therefore his justification good : And Coke cited a case 27 Eliz. where Parson Prick in a Sermon recited a story out of Foxes Martyrologie, that one Greenwood, being a perjured person, and a great Persecutor, had great plagues inflicted upon him, and was killed by the hand of God ; whereas in truth he never was so plagued, and was himself present at that Sermon : And he thereupon brought his Action upon the case, for calling him a perjured person. And the Defendant pleaded Not guilty : And this matter being disclosed upon the Evidence ; Wray Chief Justice delivered the Law to the Jury ; that it being delivered but as a story, and not with any malice or intention to slander any, he was Not guilty of the words maliciously, and so was found Not guilty, 14 H.6. 14. 20 H.6. 34. And Popham affirmed it to be good Law, when he delivers matter after his occasion as matter of story, and not with any intent to slander any : Wherefore for these reasons, it was adjudged for the Defendant.

1 Rol. 87.

Whitlock *versus* Horton, Trin. 2 Jac. Rot. 1996.

Ejectione firmæ. Upon a special Verdict the case was such ; Mary Milton and Eliz. Whitlock, being Joyntenants for life, Mary Milton by Indenture betwixt her and the Defendant, Covenanted, granted and agreed, with the Defendant ; That he shall and may have hold and enjoy, from and after the death of *Eliz. Whitlock*, the moiety of all those Lands called *Uptosts* which she holdeth in joynture with the said *Eli.* for 60 years, if she the said *Mary* shall so long live ; and doth demise and grant the other moiety of the same lands from and after the death of the said *Mary* for 60 years, if she the said *Eliz.* shall so long live, *Eliz.* survives *Mary* ; and whether this were a good lease against *M.* for any part, was the Question : And after argument at the Bar by *Tho. Ryden* for the Plaintiff, who claimed under *Mary* ; and by *Doderidge* Solicitor General, and *Wyat* for the Defendant ; It was resolved, that this lease was not good for any part. It was first resolved and agreed by all the Court, that if there be two Joyntenants for life, and the one makes a Lease for years to begin after his death, it is good to bind his Companion, as it was resolved before this time in the case of *Harby* and *Bakton* ; For as if he makes a Lease immediately for years, it shall bind his

(19).

Moor 776.

2 Rol. 89.

Co. Lit. 126. a. b.

2 Rol. 89.

Post. 417.

2 Rol. 89.

1 Cr. 207.
Moor 861.
Hob. 35.
Post. 398.
3 Cr. 486.

companton, as 3 Eliz. Dyer 182. is; So it is where he makes a Lease to begin at a future day. Secondly, it was resolved, That the words Covenant, grant and agree, That he should have the land for so many years, are apt words to make a Lease for years; and enure as a Lease. Thirdly, that by the first words, it was a good Lease from Mary of her own part: But that never hapned, because she did not survive Eliz. And it is to commence after her death, and to continue for 60 years if Mary lives so long, which never hapned by the Act of God: And this Lease is void as to Elizabeths part. For she had no power to let, or charge that, or to contract for it; and when she by the first part of the Indenture grants and agrees, That the Defendant shall have the moiety of the Land which she holds in Joynture, that is, her part which she hath power to let; and therefore she cannot contract for the residue: And although she survives, it is not material, and the words are, she let the other, that is, all which she let not before, and that is void; For she had no power to meddle with it: Wherefore it was adjudged for the Plaintiff.

Lancaster *versus* Lowe.

(20)
Co. 6. 48. b.

Error of a Judgment in the Common Bench in Quare impedit per Lowe *versus* Lancaster, and the Bishop of London. At the first day of the return of the Writ of Quare Impedit, An *Essoigne* was cast by the Bishop in this manner, J. Episcopus L. *Essoigne versus* Lowe, and doth not shew in what Plea; and the other Defendant appeared; and afterward the Bishop at the day of the Adjourn of the *Essoigns* appeared and pleaded: That he did not claim any thing but as Ordinary; and the other pleaded to Issue, and tried against the Defendant; That the Church was full of the presentment by the Queen of one Boswel *pendant le brief*; whereupon a Writ was awarded to the Bishop, to admit the Clerk of the Plaintiff, and to amove Boswel; and the Defendant, and Bishop in Misericordia. And hereupon a Writ of Error was brought in name of the Bishop, and Lancaster Incumbent; and the Incumbent only assigned the Errors. First, that this *Essoigne* is not well entred, For it is not entred in what Plea, so as the Plea is discontinued as against the Bishop, which is not aided by the Statute of 32 H. 8. although it be a Trial; For the Trial is not against the Bishop, but only against the Incumbent; And the Plea being discontinued against the one, it is a discontinuance against both, and not aided: And of that opinion were Williams and Fenner, That it is ill and not amendable: For there is a difference when the *Essoigne* is so ill cast at the first day when the Writ is returnable, that is not amendable: For it is not the default of the Clerk: For he had no Record before him, whereby he might know in what manner to enter the *Essoigne*; And the party ought to take heed it be well entred: But the *Essoigne* cast after

after the appearance of the Parties, if it be mis-entred in the names of the Parties, or in the Action, or, &c. That is amendable; For it is but matter of form, and the Clerk hath a Record before him to direct him how it should be, 2 Hen. 4. 4 Ed. 4. 3 Hen. 7. 37 Hen. 6. 4. 33 Ed. 3. Dam. 38. But Yelverton held, That it is very well amendable, for it appears in what Action, by the appearance of the other; and to that opinion Popham inclined: And if it were not amendable, yet it is aided by the Statute after trial against the other. A second Error assigned was, because a Writ was awarded to remove Boswel, who is not party to the Suit, but comes in, pendente lite, and that without any Scir. fac. sued against him. And Popham, Fenner and Williams held it to be Error, for thereby Judgment is given against a Stranger, who is not party to the Suit; And he is not to be removed, without answer; and although the Incumbent being named in the Writ, he and every other who comes in, pendente lite, is to be removed; yet that cannot be by words in the Judgment: But if upon a Writ awarded to the Bishop, he returns that another Incumbent is in, by the presentment of the Defendant, or of any other, pendente Brevi, A Scir. fac. shall be awarded against him, to answer why he should not be removed; So he shall not be put out without answer: And in a Quare impedit, if the Ordinary be not named, he may present by Lapse, if the six months incur pendente Brevi. But being named, he cannot take advantage of any Lapse, but ought to set that the Cure be served, by allowance out of the profits to be taken by Sequestration; And as he is bound that he shall not take advantage of any Lapse, so the Metropolitan and the King are bound; For no Lapse being against the Ordinary, there cannot be any Lapse against them; and so Coke cited it to be adjudged in one Dukes Case. And Popham said, The course to stop Strangers from presenting pendente Brevi, is, after a Quare impedit is depending to sue a Ne admittas to the Bishop; And if the Bishop then admits the Clerk of any other, hanging that Suit, and the Plaintiff recovers, he shall have a Quare incumbavit, and thereby remove any who comes in, hanging the Writ, by whatsoever title he comes in, and shall force him who hath right to recover by, Quare impedit. But if he Sues not such a Writ of Ne admittas, if then the Incumbent of a Stranger should come in, by good title, pendente Brevi, he shall Barr him in Scir. fac. and shall hold it. And here as this Case is, the Jury find, that Boswel came in, by the Queens presentation pendente Brevi; and it stands indifferent by what title the Queen presented: for if she presented by Lapse, she hath not any title; and if she presented by any other title, it ought to be discussed before the Incumbent be removed; which is the reason that in a Quare impedit, the Jury ought to enquire of four things. 1. Of the value of the Church. 2. Whether the Church were full, or not. 3. By whose presentment. 4. By what time, For

Co. Lit. 344. b.
Co. 6. 51. b.
Hob. 320.

Co. 6. 52. a.
Dyer 260. a.
Moor 269.
572.

Co. Lit. 344. b.
Co. 6. 52. a.
Hob. 201.

Co. 6. 51. b.

Co. 6. 49. 2.

Co. 6. 51. b.

3 Cr. 65.

3 Cr. 891.
Yelv. 3.

if the Incumbent of the Defendants presentation be in, by six months, being presented before the Writ brought, he shall not be removed, if he be not named in the Action: But if he be presented by the Defendant pendente Brevi, he shall be removed: but not if he be presented by a Stranger without a Scir. fac. Vide 7 Hen. 4. 31. 19 Hen. 6. 33. Long 5 Ed. 4. 150. Dyer 206. 277. Wherefore the Judgment was reversed. But it was afterward moved, that this Error was not well assigned; For it was assigned by one of the Plaintiffs only, in the Writ of Error, there being two Plaintiffs without summons and severance; For the Incumbent sole assigned the Errors, and sued the Scir. fac. ad audiend. Errores. And afterward he and the Bishop assigned the same Errors; and the Defendant pleaded In nullo est Erratum unto them; And for this cause all the Court held, that this assignment of Errors by one of the Plaintiffs only, was ill, and all the plea was discontinued, and not aided by the second assignment after; and so it was ruled in the Case of the Lord Cromwel and Andrews; where Andrews and nineteen others brought a Writ of Error of a Judgment in an Assise against them, and Andrews only assigned the Errors, the others not being summoned and severed, and for this cause ruled to be ill; and execution was awarded. So in another Case prim. Jac. betwixt Jones and Dixon; where Joans and the Archbishop of York sued a Writ of Error of a Judgment against them, and Joans only assigned the Errors, and therefore held to be ill: So here for this cause the Writ of Error is to be discontinued, and the Judgment was not reversed according to the former Rule; But a new Writ of Error was afterwards brought.

Loffe versus Kelbridge, Hill. 2 Jac. Rot. 2214.

(21)

Scir. fac. against the Defendant as Bail for one Littler, in an Action brought in Lynn: The Case was, that in Debt for 70 l. by the Plaintiff against Littler, Process of Capias issued against him, directed to the Serjeant of the Place there, who returned Capi corpus; and that the said Littler, Secundum consuetudinem Villæ prædictæ invenit ei securitatem, viz. one Hearing (who was dead) and the said Kelbridge ad comparendum; and if he were condemned, to satisfy the Debt, or to render himself to prison. And it was so far proceeded in the said Court, that Judgment was given for the Defendant, and thereupon Writ of Error brought, and the Judgment reversed: And now because Littler did not pay the Debt, nor render himself to prison, this Action was brought, and it was thereupon Demurred, and moved; First, that this Bail found before the Serjeant, although it were alledged to be Secundum consuetudinem villæ, is not good; For the Bail being matter of Record, cannot be found before any but the Judge of the Court; But the Bail for

3 Cr. 196.
3 Cr. 77.

for appearance only may be taken by the Serjeant; And of that opinion was the whole Court, and that for this cause the Bail was not chargeable. Secondly, it was alledged that this Bail was discharged by the Judgment, being given for the Principal in the Inferiour Court: For the Bail is, If he be condemned in that Action in the said Court, &c. And here he was never condemned in the said Court, but is discharged, and thereby the Bail is altogether discharged: And although the Judgment be reverted, and the Principal made chargeable, yet that is only for him, and doth not make the Bail (who is Collateral thereto) to be chargeable: Sed non allocatur. For the Court held, when the Judgment is reverted, It is as if that Judgment had never been given, and as if at the first the Principal had been condemned in the Inferiour Court; and the Bail as well chargeable thereby, as if the first Judgment had been given for the Plaintiff in the Inferiour Court. But for the first cause, it was adjudged against the Plaintiff.

Post. 206. 636.

Moor 850.

Sturges *versus* Judkin.

FAux Imprisonment. Supposing the Imprisonment apud Wheleston: The Defendant Justifies by reason of a Warrant upon a Capias out of the Common Bench directed to the Sheriff of Suff. made at Bury, &c. The Issue was here, *De son tort Demesne*; and thereupon a Ven. fac. was awarded de vicineto de Wheleston only; and after Verdict for the Plaintiff, it was alledged in arrest of Judgment, that the Trial was ill; for the Venue ought to have been from Bury and from Wheleston, and not from one of them only; And of that opinion was the whole Court. Wherefore Ven. fac. de novo was awarded.

(22)

Ante 43. 86.
Post. 268.

Hall's Case.

HAll was Endited before the Coronor of D. of Murder; Exception was taken, because the stroke was laid to be Super sinistram partem lateris, &c. And he doth not shew in what part, and so incertain. But the Court held it to be certain enough; for latus is a place known.

(23)

Co. 4. 41. a.
Co. 5. 121. b.

Quarles *versus* Searle.

Error of a Judgment given in Havering Bower. The Error assigned, for that in a Replevin brought there, The Declaration supposeth the taking to be apud Chelridge, in a place called Collier; and he doth not say Infra Jurisdictionem curiæ. The Defendant pleads that he took them in another place, Absque hoc, that he took them in that place; And they were thereupon at Issue, and found for the Plaintiff, and Judgment accordingly, and Er-

(24)

ror

roz thereof brought, because the Declaration was not that the place of the taking was *Infra Jurisdictionem curiæ*, &c. But it was answered by Foster Serjeant; That forasmuch as Havering Bower was in the margent, it is to be intended to be there, unless the contrary were shewn; And of that opinion was Williams, who said, That he was esopped by bringing this Writ of Error, for he thereby affirms the Jurisdiction; Otherwise the Judgment is void, and he need not any Writ of Error. But Popham, Yelverton and Fenner è contra; For it being a private Jurisdiction, ought to be especially shewn to be within it, otherwise the Court shall not intend it; But where a County is in the margent of a Declaration, and the Trespass or thing is alledged to be done apud D. and he doth not shew in what County D. is, yet it is well enough, because it shall be intended to be in the same County which is in the margent; for a general intendment shall there serve, as 34 Hen. 6. But intendment shall not be where a particular Will is in the margent to give Jurisdiction to an Inferior Court, to take away the Jurisdiction of Superior Courts, without shewing it: And although Writ of Error be brought, yet that doth not affirm the Jurisdiction of the said County D. is, yet it is affirmation, but that it may be said to be a void Judgment, and yet the Writ of Error well lies of a void Judgment. And Popham said, that he had seen a good president, 6 Ed. 3. the Lord Staffords Case, where Writ of Error was brought in this Court, of a Judgment given before Commissioners in Plea of Land. One Error assigned was, because there was not any Summons awarded, according to the Law of the Land. And another Error, because a Commission was awarded for the trying of a Title to Land, and tried before them, where it ought not to be tried by the Law of the Land but upon an original Writ. And for this cause, it was Reversed; And the special cause of the Reversal entered upon the Record: So although the Judgment there was merely void, yet a Writ of Error was maintained upon it.

Adams *versus* Goofe.

- (25) **E**jectione firmæ. Of a Lease, 6. Septemb. 2 Jac. And that he was possessed until the Defendant Postea, scilicet 4 Septemb. 2 Jac. Ejected him. The Defendant pleaded Not guilty; and after Verdict, it was moved in arrest of Judgment, that the Declaration was not good; For the Ejectment is alledged to be made two days before the Lease, which cannot be: Wherefore, &c. But Fenner, Yelverton and Williams (absente Popham) held the Declaration to be good enough: For when the Declaration is, that he was possessed *Virtute dimissionis quousque postea scilicet* 4. Septemb. 2 Jac. he was Ejected. Those words scil. 4. Septemb. 2 Jac. are impossible and repugnant; And the Postea ejecit is well

well enough, as the Case is, 20 H. 6. 15. where the Continuando Hob. 172.
 of a Trespass is alledged to be until the day of the writ purchased,
 viz. such a day, which was false recited; It was held there, that
 the viz. was void and idle, because the day of the writ purchased
 was certain enough, which appeared of Record; and the other Yelv. 94.
 being contrary thereto, was void: But they would advise, Et Ad-
 journatur. Note, there seemeth to be a great difference betwixt
 the Cases; For there the *scilicet* is superfluous, and being repugnant
 is merely void; But here the *Postea* without the *scilicet* is void: For
 then there is not any day of Ejectment shewn, which ought to be
 expressed to be before the Action brought: Wherefore, &c. And
 afterward, as I heard, It was adjudged accordingly for the Plaintiff:
 And in Trin. 15 Jac. Rot. 199. betwixt *Tesmond* and *Johnson*, where Post. 428.
Trover of goods was supposed to be 3. *May*, and the Conversion
 was supposed *Postea scil.* 1. *May* the same year, which was before the
 loss, yet adjudged good: And in this Case, this precedent of the
Ejectione firme was cited, and affirmed for good Law.

Justice Williams *versus* Vaughan.

S Cir. fac. against the Defendant as Bail for one Gouch; The (26)
 Scir. fac. recited, that Judgment was given against Gouch in Moor 775.
 debt; And that he had not paid the condemnation, nor rendered
 himself to the Marshalsey according to the Bail; The Defendant
 pleads, that the Principal was dead before the Scir. fac. brought;
 and thereupon the Plaintiff demurred: Because he alledgeth not
 when he died; nor that he died, before the Capias awarded against
 him; And the whole Court for this cause held the Plea to be ill. Post. 165.
 And although exception was taken to the writ of Scir. fac. because
 it is not mentioned therein, that the Capias was awarded; yet it
 was held to be good enough: And the Clerks said, their course is Moor 776.
 oftentimes to omit it in the Scir. fac. And the Court held, that the Infra 98.
 course of reciting or omitting it is good enough; For it is not of
 necessity to be recited.

Elizabeth Hargrave *versus* Richard Rogers.

Debt for 60 l. For that he and John Woodbridge and Wil- (27)
 liam Rogers, in Mich. Term. 42 Eliz. in the Common Bench, Ante 45.
 Et quilibet eorum Manuceperunt, & quilibet eorum Manucepit, viz.
 the said William Rogers in 120 l. and the said Richard Rogers
 and John Woodbridge in 60 l. That the said William Rogers
 within eight days post monitionem sibi by the said Eliz. or her
 Attorney given, should appear before the Queens Justices of
 the Common Bench by himself, or Attorney upon an Action of
 Debt of 60 l. to be sued by the said Eliz. against the said Wil-
 liam Rogers, before Octab. Hillarii next following, and there to
 answer

answer; and if he were condemned, to satisfie her the said Debt and Damages, or to render himself to the Fleet: Which Sum of 60 l. Uterque Manuceptorum recognovisset to be levied of his Lands and Chattels, &c. And alledgeth in fact, that 28. Novemb. 42 Eliz. She brought a Writ of Debt of 60 l. out of the Chancery against William Rogers retornable in the Common Bench, Octab. Martini following; and that She gave notice thereof to the said William Rogers 13 Novemb. 42 Eliz. and that at Octab. Martini the said William Rogers appeared; and the Sheriff returned the Writ served: And that he at the said day declared against William Rogers in the said Action, Et Taliter in eadem curia processum fuit; That Judgment was given thereupon against William Rogers, and Capias awarded against him; And he did not render himself to the Fleet, nor pay the condemnation, nor shew that the Record and Bail were removed into this Court by a Writ of Error; Unde Actio accrevit. The Defendant pleads, Quod non dedit monitionem juxta formam & effectum recognitionis: The Plaintiff saith, Quod dedit monitionem, &c. and thereupon they were at Issue, and found for the Plaintiff; And it was now alledged in arrest of Judgment, That this mainprise or Reconuſance was not well taken, to have a mainprise before an Action brought; But the Court said, it was the course to take such Reconuſance where the Cause is removed by Hab. corpus: And this Court ought to take Conuſance of the course of the Common Bench. Secondly, because it is alledged, That this Record is removed by a Writ of Error, and it is not expressed whether it were reversed or affirmed. Sed non allocatur; For it is but an inducement to the Action; Et non refert how it came hither, viz. by Mittimus out of the Chancery (which is the usual and best course) or otherwise, for being here, it sufficeth to ground an Action thereupon. Thirdly, because he doth not shew whether the Capias was returned or not. Sed non allocatur; For the awarding of the Capias is but ex gratia curiae, and not material whether it be awarded or not. Fourthly, for that it is alledged he did not render himself to the Fleet, whereas it ought to have been to the Marshalsey, the Record being here. Sed non allocatur; For the rendering ought to have been in the Court where the Judgment is: Wherefore it was adjudged for the Plaintiff.

Ante 46.

Ante 97.
3 Cr. 597.

(28)

1 Rol. 499.
2 Rol. 41.
Co. 4. 23. b.
Co. Lit. 58. b.
59. b.
Fest. 105.

SHoplane *versus* Roydler, Ant. fol. 55. Was now moved again, and Gawdy Chief Justice, Warberton and Daniel held, That the Grant by the Guardian in Socage was good, and should bind the Heir; For he is Dominus pro tempore, and hath interest in the Land, and may let it for years, as Plow. 299. And a Guardian in Socage may adow in his own name and right, as 34 Ed. 3. Avow. 298. & 7 Ed. 3. 38. ac. But Guardian in Socage,

or

or by nurture cannot present to an Abbowson, because he cannot account for it, as 28 Ed. 3. 89. 29 Ed. 3. 5. 8 Ed. 2. Presentment
 10. (But by Daniel, if the Heir be within age of discretion, there the Guardian shall present) And a Guardian shall have Trespass or ravishment of ward, as 15 Hen. 7. 13. is, & N. B. 139. He may have a right of ward, 25 Ed. 3. 52. contra, and a Guardian shall have *Guard per cause de Guard*: So he hath interest to hold Court; and a Copyholder admitted is in by the custom: And a Bayliff cannot grant by Copy, because he hath not any interest, but a Guardian hath interest *Ex provisione legis*, although he shall not forfeit it; For then the Heir should lose the Account: And the Guardian here shall account for the fines which he takes; And it would be inconvenient if he might not let by Copy, for the Heir cannot, and the Law will not compel one to occupy it: And the Court ought not to be kept in the name of the Heir, but of the Guardian; wherefore he shall grant Copies, &c. And it is all one where one hath interest by Act of Law, and where by Act of the Party; And as a Guardian in Socage may make a Lease for years and it is good, and his Lessee may have an Ejectione firme, a Fortiori he may grant Copies: But a Bayliff hath not any interest at all, and is not Dominus to any purpose. And Gawdy cited 8 Eliz. 251. That Tenant by Elegit may grant Copies, and a Guardian hath interest in his own right, although his Executors cannot have it, because it is annexed to his Person: Wherefore, &c. But Walmley è contra, because Dominus ought to be a perfect Lord: But such a Guardian is but Dominus ad commodum hæredis, vel potius servus ejus: And here it was not necessary to grant, because it was a Copy in reversion: And he is not said to be Dominus who can neither grant nor forfeit: And he shall account only de exitibus Terræ, as Fitz. Account 118. is. And right of ward lieth not for the Land, but only for the body, as Nat. Br. 139. is, and an interest brings a profit: But here this doth not bring any profit, therefore it is not any interest. And a Guardian differs only in name from a Bayliff, for both are accountable: And a Baron seised in right of his Feme cannot grant Copies in his own name, but the Feme ought to joyn. He who enters upon condition to retain until he be satisfied, cannot grant Copies: And it is not reason that he should grant Estates which shall endure after his own Estate be determined: Wherefore, &c. But notwithstanding his opinion, it was afterwards adjudged that the grant was good.

Alden *versus* Blague, Pasch. 3 Jac. Rot. 1033.

Covenant: For that the Lessee covenanted for him and his assigns to repair and maintain the houses in reparations from time to time during the term: And shews that the Lessee

assigned all his Term to the Defendant ; And for default of reparations after the assignment he brought the action against the Assignée : The Defendant pleads, that after the decay he made such a Concord, that the Plaintiff should have 30 s. and such goods in satisfaction of that destruction, &c. and shews it to be executed ; whereupon it was demurred and moved for the Plaintiff, that it was not any Plea ; For the action being grounded upon a Debt, cannot be discharged unless by Debt ; as an obligation with a condition cannot be discharged by a Contract. But all the Court held, that the Plea was good enough, for it is not pleaded in discharge of the Covenant, but only for the damages which are demanded by reason of the breach of the Covenant, and the Covenant remains ; and this Plea sounds only in discharge of the Defendant, and is not like to the Case of an Obligation ; For there, it is a duty certain, and it is not any Plea, although it be before or after the day of payment ; And in every Action where only amends is demanded by way of Damages, Accord executed is a good Bar in discharge of them. Vide 3 Hen. 6. 37. 3 Hen. 4. 1. 47 Ed. 3. 12. Dyer 75. & 201. And Daniel said, that in waft against Tenant for years Accord is a good Plea ; But not against Tenant for life : And afterward in the principal Case it was adjudged accordingly, that it was a good Barr.

Porter *versus* Porter.

(30)

Two Joyntenants Copyholders in Fee ; The one surrenders into the hand of two Tenants, to the use of his last Will, and makes his Will of that Land, and dies ; The surrender is afterwards presented. Whether it shall bind the Survivor ; And resolved per Curiam that it should ; For being presented, It shall relate to the first time of the surrender. Wherefore it was adjudged accordingly.

Post. 403.

Brook *versus* Rogers, Hill. 2 Jac. Rot. 2292.

(31)

Prohibition. For that a Parson sued in the Spiritual Court for Tythes of boughs of Trees above the age of twenty years ; surmising in his Plea, that the trees were Arida, cava, & in culminibus putrida, and therefore prayed consultation ; and upon this Plea it was demurred : For it was alledged for the Plaintiff, that in regard the Trees were once discharged from the payment of Tythes, the boughs nor the bodie of such Trees shall never after be charged with the payment of Tythes coming of them. And the Statute of 50 Ed. 3. is but in affirmance of the Common Law, which was agreed unto by the Court. But they doubted of the principal Case, for Gawdy and Daniel conceived they were not now Tythable, because once they were not ; and the body being privileged, so shall the boughs : But Warborton and Walmfley

Moor 908.

1 Rol. 640.

3 Cr. 477.

2 Inst. 643.

Moor 908.

1 Rol. 640.

Co. 11.49.2.

3 Cr. 478.

Walmſley doubted thereof: Becauſe the Trees were not for other uſes then for firing, and bear not any fruit, and it was not waſt to cut them down; Therefore they were Cythable: And they all held, That Trees aboue 20 years growth, which be timber, al- though the Loppings are cut every 10 or 12 years, yet they be not Cythable. Et adjournatur. Moor 908.
2 Inſt. 643.

Whitton *verſus* Williams, Paſch. 3 Jac. Rot. 164.

Ejectione firmæ. Of a Leaſe of the Earl of Exon of Land par- cel of the Mannor of Wimbledon: Upon Demurrer the Caſe was, That a Coppyholder had ſix Sons; where the Land was of the nature of Burrough-Engliſh, as well for the Brother as for the Son: The Coppyholder being dead, the ſixth and youngſt Son was admitted; The fifth Son went beyond Sea; The ſixth Son died without Iſſue: The fourth Brother was admitted as Heir, pretending that the fifth Brother was dead without Iſſue; and afterwards ſurrendered into the Stewards hands to the uſe of another in Fee: And ſo three others were admitted, the one after the other: The Lord afterward being informed that the fifth Son was alive, and it being ſo preſented; Three Proclamations were made for his coming in, to be admitted according to the cuſtom of the Mannor: And for not coming, the cuſtom was, that the Land ſhould be forfeited: The fifth Son (being beyond Sea) Released by Deed to a Coppyholder: The Lord afterwards for his not coming, ſeiſeth it as for a forfeiture: All which matter being diſcloſed in pleading; it was demurred in Law. The firſt Queſtion was, Whether this Release by him who had right to the Coppyhold, made to one who came in by the Lords admittance, ſhall be good to veſt his Eſtate in him. Secondly, Whether this cuſtom of Non-claim to be forfeited, ſhall bind him who was beyond Sea at the time of the Proclamation made; and at the time of the Deſcent unto him. For it was agreed by Tanfield, who argued for the Defendant; That if he had gone over Sea after the Deſcent, he had been bound: And Walmſley, Warberton and Daniel held, that it ſhould not bind him who was beyond Sea. Thirdly, Whether the Lord by admittance of the fourth Son as Heir (who was not Heir) and acceptance of his ſurrender to the uſe of another, and his admittance of the other, be bound or not. No opinion was delivered by the Judges, after argument at the Bar, by Forſter for the Plaintiff, and by Tanfield for the Defendant. Sed Adjournatur. (32)
Ante 36.
Co. 8: 100. b.
Poſt. 226.
1 Cr. 234.
Poſt. 403.

Turnor *verſus* Sir Edw. Darcie, Paſch. 3 Jac. Rot. 906.

Action for theſe words; He, (prædict. Querentem innuendo) and one Allen, are perjured Knaves; Upon Not guilty plead- ed, (33)

1 Cr. 512.

Post. 107.
Hob. 268.

ed, and found for the Plaintiff: It was moved in Arrest of Judgment, that He cannot be referred to two persons, and are perjured Knaves, cannot be referred to one person: So it cannot extend to the Plaintiff. But the Court held it to be well enough, although it be false English; for the sense appears: And it is not like to the case, where one saith, that J. S. and J. D. is perjured: or if one saith to thér, that one of you is perjured, that is void, for the incertainty; But in the principal Case, it was adjudged for the Plaintiff.

Milles *versus* Sherfield, Trin. 2 Jac. Rot. 1653.

(34)

Ant. 8.
Ante 35.

DEbt, against an Executoꝝ upon an obligation, He pleads a Statute acknowledged by the Testatoꝝ of 3000 pounds, not discharged, and doth not say, That it was pro vero & justo debito; and it was thereupon demurred: For it was agreed by all, That if it be a Statute for performance of Covenants, and they be not alledged to be broken, it is no Barr; and it shall be intended to be so, if the contrary be not shewn. Et Adjournatur.

Fletcher *versus* Pynfett.

(35)

2 Rol. 585.
Post. 542.Ante 57.
1 Cr. 35. 385.
Post. 183. 229.
288. 405. 552.

COvenant: That he should assure such a Coppelhold to the Plaintiff, if he married with his Daughter secundum Leges Ecclesiasticas; And alledgeth, that he rite & legitime espoused the Daughter of the Defendant, &c. and Issue thereupon, and found for the Plaintiff, and Exception taken: Because it ought to be tried by Certificate from the Bishop, and not by a Trial *per pais*; Sed non allocatur: For the Marriage is only in Issue; And not, whether he were lawfully espoused: And it was also held, that it was sufficient for the Plaintiff to alledge Licet sapius requisitus, without giving notice of the Marriage: For he at his peril ought to take notice thereof: As also, that he need not to shew a Court to be holden: For he ought to procure a Court to be holden: wherefore it was adjudged for the Plaintiff.

Walker *versus* Ballamie, Pasch. 3 Jac. Rot. 930.

(36)

Co. 6. 38. a.
1 Rol. 471.Co. 6. 38. a.
Co. 4. 120. a.
Co. Lit. 215. a.

TRespals. The Case was, Lessee for years upon condition, That he shall not alien any part without licence in writing from the Lessor, obtains Licence in writing to alien part: The Lessor afterwards grants the Reversion, and the Lessee attourned, and after aliened part: The Grantee enters, the Lessee brings Trespals: The Grantee justifies by reason of this Condition: The Lessee shews, that he did it by Licence in writing, but shewed not the writing: And it was thereupon demurred; And resolved per Curiam, That the Plea was good enough,

enough without shewing it: Because the Licence of its nature cannot be without writing, and there did not any Interest pass thereby, but a restraint only set upon a liberty; and it is a thing executed, and his Assignee peradventure hath it for the fortifying his Estate: And it was held, that although the alienation was, after the Grant of the reversion, by the Licence of the Grantor, yet it was good enough: And it was adjudged accordingly.

Post. 109. 10.

Co. 6. 38. b.

Co. Lit. 52. b.

Pyfter versus Hemling, Trin. 3 Jac. Rot. 341.

Ejectione firmæ. Upon Demurrer, Resolved, that if one pleads Seisin of a Copyholder in Fee, and claims under him; he ought to shew of whose Grant, as he ought to shew of any other particular Estate: And although it was said, it may be so ancient, that it cannot be shewn who was the first Grantor; yet it was held sufficient to shew the admittance of the last Heir, which is in nature of a Grant, and may be pleaded by way of Grant: And that although the Demurrer were general, yet it may be alledged to the Court for Exception.

(37)

1 Cr. 190.

2 Cr. 571.

Ante 52.

Co. 4. 22. b.

Bridge versus Cage.

Action sur le Case, in an Assumpsit; whereas an Executor sued Execution, by an Elegit; The Defendant ut amicus Executoris in consideration that the Sheriff would execute the Writ, and that for 6 d. given unto him by the Plaintiff, being Under-Sheriff of Cambridge-Shire, promised to give the Plaintiff 60 l. and alledges in fact; That he executed the Writ, and thereupon brought the Action: After Verdict for the Plaintiff, it was moved, That it was not any consideration to maintain the Action: For the Sheriff by his duty and Oath ought to execute the Writ; and therefore to have a promise of consideration for executing it, is not lawful, and it is quasi Extortion, and therefore ill and unlawful; And although it was alledged, that this Sum promised him is no more then what the Statute of 29 Eliz. cap. 4. allows him to take for his fees, yet that will not help the Case: For that Statute only excuseth him for his taking fees, if it be no more then what the Statute permits; whereas the Common Law did not permit him to take any thing for the executing Writs. But Warberton said, although the Statute tolerates it, that it is not punishable (as the Murd of 10 l. per 100 l. is tolerated) yet it hath been often times adjudged; That for such fees he hath not any remedy by any Action: And Gawdy said, it is not reasonable, that for the executing of a writ by Elegit (where peradventure the Land is not worth forty shillings) he should have six pence for every pound of the Debt: And here the giving of six pence is no sufficient consideration, being

(38)

1 Rol. 26.

3 Cr. 654.

Hob. 13.

1 Cr. 286. 7.

3 Cr. 335. 54.

3 Cr. 634.

being joyned with the other which is unlawful : Wherefore it was adjudged for the Defendant.

Kerry *versus* Derrick, Mich. 44 & 45 Eliz. Rot. 125.

(39)
Moor 771.

Moor 772.

T Respass. Upon a special Verdict the case was ; A man let several Houses and Lands to several men, by several Leases for years, rendring several Rents, amounting, in toto, to 10 l. per ann. and afterwards made his Will in this manner ; As concerning the disposition of all my Lands and Tenements, I bequeath the Rents of D. to my Wife for life, remainder over in Tail : The Question was, whether by this Devise, the reversions did pass with the Rents of those Lands : For it was alledged, that the Rent divided from the Reversion is not deviseable within the Statute ; For he had no Inheritance therein, 26 H. 8. 5. Dy. 140. And after argument at the Bar, the Court resolved, that the land it self should pass by this Devise : For it appears, his intent was to make a Devise of all his Lands and Tenements, and that he intended to pass such an Estate as should have continuance for a longer time then the Leases should endure : And the words are apt enough to conveiy it according to the common phrase, and usual manner of speaking of some men, who name their Land by their Rents : Wherefore it was adjudged accordingly.

Woody *versus*

1442. 286. (40)

DEbt, upon the Statute 37 H. 8. of Usury ; The Writ was, That he corruptive lent 40 l. &c. against the form of the Statute : And that he such a day lent 20 l. &c. against the Statute : But doth not say corruptive. The Defendant pleaded Non debet, and found against him ; And it was moved, that the Plaintiff should not have Judgment for any of those Sums : For it is clearly ill for the 20 l. for want of the word corruptive ; But all the Court held, that it being good for part, he shall have Judgment for that part : For being for several Sums, it is in nature as two several Actions : So although it be void for one, it is well enough for the other, being it is but a mispension in his Writ or Count : But where one brings an Action for two things, and shews by his own confession, that for the one he had not any cause of Action, or is to have another Action, it is otherwise, as 10 H. 6. 5. 41 Ed. 3. 2. 9 H. 6. 10. 9 H. 7. 3. 21 H. 7. 34. Dyer 369. Ejectione custodiæ of Land and Body ; it lies not for the Body, and is good for the other, Dyer 325. Wherefore it was adjudged for the Plaintiff, for the 40 l. And it was held, That if in this Case the Defendant had demurred upon the Declaration, it had ben good for the one, and the Plaintiff should have had Judgment for that part.
So

So in debt against an Executor upon an obligation of the Testators, and upon a simple Contract, it is good for the Obligation.

Burrel versus Sir William Bowes.

DEbt. Upon an Obligation, dated 13. Feb. The Defendant impails, and afterward a second Declaration was made; And therein he declares upon an Obligation, dated 15. Feb. And the Defendant pleaded *Non est factum*, and Issue entred; And afterwards the variance being discovered, he prayed to have it amended, and to be made according to the first Declaration, and so it was by order of Court: For the first is the principal; and all the pregnanties said, there is not any inconvenience to the Defendant thereby: For his Plea always refers to the first Declaration, and is entred as to the first. (41)

Ante 89.
Post. 311. 415.
498. 525.

Bradshaw & versus

Divers Debts were assigned to the Plaintiffs, being Creditors, by the Commissioners upon the Statute of 13 Eliz. of Bankrupts, and they sued an Action in their own names for those debts: And it was ruled, that it well lies; For it is a debt transferred by Parliament, and being upon a Contract, the Defendant gaged his Law, and was admitted thereto: For although the Parliament transferred the debt, yet it is not any debt of Record: But as he might have gaged his Law against the Bankrupt, so he may against the Plaintiffs. (42)

Jud. Ref. 163. 41
Jud. Ref. 164.

1 Cr. 187.

Eavers versus Skinner, Mich. 44 & 45 Eliz. Rot. 1112.

REplevin *sur Demurrer*. The Case was, Sir Edw. Champenone being Committe, of a Ward, who had a Mannor wherein were divers Copyholders, amongst whom one was mutus & surdus, granted the custody of that Copyhold Land to another, who entred, The *prochiene amie* of the Copyholder entred; And which of them should have the Custody, or if none of them, was the Question; And it was resolved, That the Lord should have the Custody: For otherwise he should be prejudiced in his Rents and Services; And his Grant was good: Wherefore it was adjudged for the Grant. (43)

Dier 56. a.

Hob. 215.

Ante 98.

Collins versus Cancke, Trin. 2 Jac. Rot. 438.

UPon a special Verdict the Question was: Baron seised in right of his Feme of Copyhold Land, surrenders, whether it be discontinuance: And Walmly held it was; Notwithstanding the Case in Co. 4. fol. 23. a. And notwithstanding a Case cited to be adjudged, Hill. primo Jac. Rot. 634. in the Kings Bench. (44)

1 Cr. 7.
Co. 4. 27. a.

Bench. That such a Surrender by Tenant in Tail made not any discontinuance: No Judgment was given here, but they pleaded de novo.

May *versus* Inhabitants Hundred de Morley,
Pasch. 3 Jac. Rot. 539.

(45)

Co. 7. 6. 7.

3 Cr. 270.

Action, *sur le Statute* de Winton of Hue and Cry: The Jury found, That the Robbery was done post lucem ejusdem diei ortum & ante solis Anglice, after Day-break, and before Sun-rising; And upon this the Court advised, and Judgment was given for the Plaintiff, and a present shewn, Pasch. 28 Eliz. Rot. 130. where the Robbery was done post occasum Solis & per diurnum lumen, Anglice Day-light, and there adjudged for the Plaintiff.

Termino

Termino Hillarii,

Anno tertio JACOBI Regis in Banco Regis.

Memorandum, That the third day of this Term, *Thomas Coventry* was made and sworn one of the Justices of the Common Bench; And the same day, Sir *Lawrence Tanfield* was made and sworn Justice of the Kings Bench: both being of the *Inner-Temple*. (1)

William Wiseman versus Wiseman.

Action for words, wherein he declares, That the Defendant dixit de præfato Querente existente fratre suo naturali, My Brother (præfatum Querentem innuendo), is perjured; The Defendant pleaded Not guilty, and found against him; and it was moved in Arrest of Judgment, that for these words no Action lies: For they be incertain, when he saith My Brother, what Brother he intended: For it may be he had divers brethren, and every of them might have his Action for these words; And (the innuendo the Plaintiff) when the words themselves do not import a certain slander, will not help it; And of that opinion was *Yelverton*: For words Actionable ought to import in themselves precise slander without ambiguity, so that every one who hears them might intend of whom they be spoken: For otherwise, if it should be helped by the Averment of the Plaintiff: every one who is his Brother might make such an Averment, and have an Action; which is not reasonable: Wherefore he held that the Action lay not; And although the Verdict be given for the Plaintiff; yet that doth not help the Declaration, if ill; But *Williams* held, that the Action was well brought; because the Plaintiff shews in the Declaration, that he spake those words of the Plaintiff, and the Jury finds him guilty; And so the Court is ascertained they were not spoken of any other. *Tanfield* made a difference, when the words themselves import in themselves apparent incertainty, and when they may be ascertained by Intendment: In the first case no averment will aid it; But in the last case by the Averment and Verdict it may be aided; And therefore if the words had been one of my Brothers is perjured; There be in them an apparent incertainty. And although one of the Brothers would bring the Action, and aver they were spoken of him, because it appears to the Court there

(2)
1 Rol. 79. 80.

Post. 635.
1 Cr. 177.
1 Cr. 443.
Post. 154. 444.

1 Rol. 79.

Ante 102.
Hob 268.

1 Cr. 177.
Post. 635.

were divers Brethren, and it doth not appear to any, of whom he spake; The Action lies not, although he be found guilty by Verdict: But here it doth not appear to the Court, that there be more Brothers than one, and therefore may be intended certain enough, and may be well known of whom he spake, if he hath but one Brother: And it is expressly averred, that he spake of him, and found by the Verdict, that he is guilty, therefore he held it to be good enough: And cited a Case in this Court wherein himself had been of Counsel: That murderous Knave *Stroughton* lay in wait to murder me; And one Tho. Stroughton brought an Action thereupon; and said, they were spoken of him, and the Defendant pleaded Not guilty; And after Verdict for the Plaintiff, it was moved in Arrest of Judgment, That the words were uncertain, and therefore the Action lay not: But after divers motions, it was adjudged for the Plaintiff; so here; wherefore, &c. Wherefore Rule was given (The other Justices being absent) That if other cause were not shewn by such a day, Judgment should be for the Plaintiff: And it was afterward moved in full Court, and resolved by them all; That the Action well lay: And adjudged accordingly.

1 Rol. 80.

Shepherd *versus* Allen.

(3)

ERror of a Judgment in this Court; The Record was removed into the Exchequer-Chamber: And it was prayed, That the Defendant being in Execution, might be bailed: And because the Record was removed, so as there was not any Record here: It was held, That he could not be bailed here; And he cannot be bailed in the Exchequer-Chamber: For they have not any Authority, but to Reverse or affirm the Judgment, and not to make Execution: Wherefore he was not bailable.

4 Inst. 21. 74. Post. 429.

Post. 620.

Prat *versus* Dixon.

(4)

1 Cr. 91.
Post. 261.

ERror of a Judgment in Norwich; The Error assigned was, because in an Action of Debt, the Record was Attachiatus est, where it ought to have been Summonitus est: For that ought to be as an Original, and for want thereof it is Error: And it was moved, that in regard the Defendant had appeared, and pleaded to the Issue, and Verdict and Judgment is given, it is not now assignable for Error: For it is but want of an Original, which is holpen after Verdict by the Statute of 18 Eliz. But Popham and Williams (being there only) held; That it is not aided by the Statute; For that is intended of the want of Original Writs which are sued out of the Chancery, returnable in the Common Bench, or Kings Bench: The want of such an Original is aided; But it extends not to Process, which is in nature

Post. 479.

nature of an Original Writ; And therefore it hath been ruled, that the want of Bills upon the File in the Kings Bench (which is in nature of an Original Writ) is not aided: So the want of a Bill in the Exchequer, which is there in nature of an Original Writ; So the want of this Summons which ought to have been, is not helped; And it was said, that it had been divers times so resolved: Wherefore for this cause, the Judgment was reversed.

1 Cr. 282.
Hob. 130.

Hill versus Saundeford.

After Judgment in this Court, A Capias was awarded against the Principal, and returned Non est inventus, and afterward a Scir. fac. was awarded against the Bail, who was returned Nihil, and a second Scir. fac. awarded; And he brought in the Principal, and prayed that his body might be accepted in execution: And Kemp the Clerk said, that he came too late; For (in extremity) after the Capias returned Non est inventus, and a Scir. fac. awarded, he cannot bring in the body of the Principal. But now of late time (in favour of the Bail) they use after the first Scir. fac. awarded, before the return, to allow him the favour to bring in the Principal: But after it be returned, and a second awarded, it was never seen. But Popham said, that it might be very well, unless the first be returned Warned, and Judgment given thereupon: For the Scir. fac. otherwise would be to little purpose, to bring in the Principal. Wherefore the Principal was received.

Post. 164.
Hob. 216.
Moor 850.

3 Cr. 618.
1 Rol. 324

Predyman versus Wodry.

Trespas: Upon Demurrer, a Question was made, whether a Lease of a Mannor being forfeited to the Queen by attainder of Treason may be granted under the Exchequer Seal. Popham, If any Mannor or Land, of whatsoever value, comes to the King by attainder or otherwise, the custody thereof may be granted over, under the Exchequer Seal by the Authority of the Lord Treasurer and Chancellor there, without special Warrant; For it is but a disposing of the profits, because the King himself cannot manure it; And it is always revocable, Si quis plus dare voluerit. So a Lease for years of another Land, which comes to the King by attainder, is but a Chattel in him, and vendible for his best profit, and therefore is grantable under the Exchequer Seal; For it is as a Sale: Wherefore the Grant is good; and to that opinion the other Justices agreed. Secondly, it was held, that he who intitles himself to this Lease by assignment under this Grant, needs not shew the Original Lease in pleading, although it were by Deed; Because it might have been made without Deed: And for that the King comes

(6)
Co. 2.16. b.

1 Cr. 513

Ante 103.
1 Cr. 209.
Post. 317.
Co. 5. 79. d.

comes to it in the Post, and by intendment cannot have it. And it was said, If a Lease for years be made to a Corporation, who cannot take without Deed, and they grant it over; The Grantee may entitle himself thereto, without shewing the Deed; Because the Lease of the thing in its nature might have passed without Deed; although the Persons who took it, could not take it without Deed. Also his possession is some privilege for his Title. Wherefore, &c.

Ante 103.

*Lee versus Mynne, and his Wife, Executrix of
Thomas Tanner.*

(7)
Yelv. 48.

A Sumpfit. Whereas Thomas Tanner was indebted to Thomas James in 20 l. and after the said Thomas James died and made Elizab. his *Feme* Executrix; And whereas the said Thomas Tanner was indebted to the said Eliz. James in 10 l. for Merchandise bought of her; and after the said Thomas Tanner died, and made his wife (now the wife of the Defendant) his Executrix, and left unto her Assets; and after the said Eliz. James took the Plaintiff to husband, 1. June 44 Eliz. who 24. June 44 Eliz. required payment from the Defendants wife of the said sums. The Defendants wife, then and there in consideration he would forbear the said Debts until Bartholomew tide following, and would deliver to her Servant to the Defendants use, so much Wares as he required, promised that she would pay for all at the said Bartholomew tide; And alledgeth in fact, That he forbore the said debts, and did deliver so much Brasil wood to the Defendants Servant George Gill to the Defendants use, amounting to such a Sum, and she had not paid: The Defendant takes Issue, That he did not deliver to her Servant *Modo & forma* prout, &c. And thereupon Issue being joyned, it was found for the Plaintiff, and after Verdict, moved in arrest of Judgment: First, because the ground of Action to the Plaintiff, ariseth principally from the Plaintiffs wife as Executrix to her husband, and for debt due unto her *dum sola* suit: Therefore she ought to have been consjoyned in the Action; For otherwise the Damages which are given in this Action, cannot be a Bar of the debt, and the Damages are given for the debt, and to the value of the debt, therefore it is reason they should be a bar of the debt, which cannot be as this Case is. Yelverton held it to be a good cause of exception, but Williams and Tanfield *e contra*; For it was but part of the cause of the consideration, and the other part was, by reason of the delivery of the Wares; Also the forbearance is his Act only, and therefore the Action lies for him only: And although they all agreed, that Damages recovered in an Assumpfit, may be a bar of a debt; yet it is not so by Law in this Case, the consideration being collateral. Secondly, For that he alledgeth forbearance of the Suit thereby; but doth not alledge that he forbore the pay-

1 Cr. 438.

Post. 127.
3 Cr. 406.

Post. 207.
1 Cr. 415.
Yelv. 84.

payment; Sed non allocatur. Thirdly, That the Issue is misjoyned, for it ought to have been, that George Gill was not her Servant, for it is now a Negative Pregnant. Sed non allocatur; for it *Tantamounts*. But Tanfield, upon reading the Record, took another exception; Because he doth not alledge that his *Feme* was alive at the time of the promise made, for otherwise he had not any Debt, nor could the forbearance thereof be any cause of Action; and of that opinion were Williams and Yelverton: Wherefore (*ceteris absentibus*) it was adjudged for the Defendant.

Ante 87.

Yelv. 84.
Co. Lit. 351. b.
Post. 146.Smith *versus* Smith.

ERROR: Of a Judgment in Dower in the Common Bench: (8)
The Error was; for that the Tenant was an Infant, and Judgment was given against him by default; and this being the Sole Error assigned, the Defendant in the writ of Error pleads thereto, In nullo est Erratum; so the Infancy was confessed, and it was now moved to be no Error. And Williams and Tanfield being only in Court, held, that it was not Error; for Dower is demandable against an Infant, and he shall not have his age: wherefore it is reason his default should prejudice himself, and not the Plaintiff; for otherwise, the *Feme* should never recover during his minority, for he would always make default, and Dower is to be favoured. Wherefore rule was given, if other cause were not shewn by such a day, That Judgment should be affirmed.

Co. Lit. 35. b.
Moor 847.
3 Cr. 567.
Post. 352.Ford *versus* Hunter.

ACTION of Debt was brought upon the Statute of 8 Eliz. for costs in an Ejectione firmæ; The Plaintiff being Non-suited, and supposing the Statute to be made, Ad Parlamentum tentum Anno octavo Eliz. whereas the Parliament began Anno quinto, and by prorogation was held in octavo Eliz. so it ought to have been Ad Sessionem Parliamenti tent. Anno octavo Eliz. And for this cause, after Demurrer, it was ruled to be ill. And Judgment was given against the Plaintiff.

1 Cr. 222.
Post. 139.Talentine *versus* Denton, Trin. 2 Jac. Rot. 821.

TRESPASS for 20 Cocks of Barley, &c. for Tythes cast out from the nine parts, and taken and carried away; Upon Demurrer the Case was, the Bishop of Carlile was seised in Fee of the Tythes in right of his Bishoprick, and by Indenture demised the Tythes of to Summers and two others for three lives, rendering the ancient Rent; And it was averred, that they were anciently let for that Rent. Afterward the Bishop died, and

(10)
2 Rol. 446.
Moor 772.
2 Suid. 304.

2 Rol. 446.
Moor 778.
3 Cr. 407.
Co. 5. 3. 2.
Co. Lit. 44. b.
Post. 173.

Post. 173.
Co. 5. 3. 2.
2 Sand. 304.

Co. 4. 76. a.
Co. 5. 2. a.

and the Successor made a new Lease for years, &c. And whether this first Lease for three lives rendring the ancient Rent was good by the Statute of 1 Eliz. was the Question; And after argument at the Bar, Yelverton, Williams and Tanfield held, that this Lease was void against the Successor: For being for lives rendring Rent, there being nothing let but the Tythes which lie in Prender, nor any place wherein a Distress might be taken, nor any remedy for the Rent if it should be denied, (for he cannot have Debt, because it is a Freehold, nor can he have an assise, because there is not any Seisin; and if there were Seisin, yet the assise would fail, because there is not any Land to be put in view) therefore by consequence the Lease is void. But if it had been a Lease for years (for which he might have had his remedy by Action of Debt,) it had been otherwise: And Williams said, he had known it to be so adjudged upon this difference: So it is of all other things which lie in prender or render, where no Distress can be taken. Note that here the Defendant pleaded this Lease for life by way of Bar without mentioning any confirmation or Rent: Or averment, that the ancient Rent was reserved, or that the Land was anciently used to be let: The Plaintiff intitles himself by a Lease for years, and the Defendant by way of rejoinder shews, that the Tythes were usually let, and for that Rent which was the ancient Rent; And it was thereupon moved, admitting it to be a good Lease: yet the Plea was ill; because it is a departure, and that there is not any confirmation; But because they resolved for the Plaintiff upon the principal matter, they spake not to those exceptions, but gave rule, that if other cause was not shewn, Judgment should be entred for the Plaintiff. Note, *Popham* was absent, who upon a former motion in this cause, said, he much doubted of the Case, and that it was a common Case for all Tenants in Tail, Bishops, Deans and Chapters, to make such Leases; and they had been accounted good, and they all were in one degree: Wherefore he said, he would well advise thereof; And it was afterwards adjudged for the Plaintiff. And after that, a Writ of Error was brought of this Judgment, and the Error assigned in the matter in Law; And because the Statute of *prim. Eliz.* was not specially pleaded; It was resolved that the Court should not take notice thereof, because it is but a private Statute; and then the sole Question was, whether it were a good Lease by the Statute of 32 Hen. 8. For if it were good within the Statute, it should bind the Successor without confirmation: otherwise at the Common Law, it should not bind the Successor; And it was resolved, that it was not good, because there is not any remedy for the Rent by Distress or Assise: Wherefore it is out of the intent of the Statute. And the Judgment was affirmed:

Agnes Adams *versus* Cheverel.

T Respals by the Plaintiff, as Executrix of John Adams (11)
 against the Defendant; for that he took, chased and eloiigned
 to places unknown, two Oren which were the Testators tempore
 mortis suæ, to the damage of the Plaintiff 30 l. Et in retardatione
 Testamenti, and shews the Testament; And the Defendant there-
 upon demurred in Law: And it was moved, that this Action
 brought by an Executor is not good, because there ought to
 have been mentioned, That the goods were taken extra custodiam
 suam; which is properly, where an Executor brings an Action
 for goods of the Testators taken after his decease: the Action
 being brought as Executor, ought to have mentioned it to be
 extra custodiam suam, So is the Register, Fol. 49. 42 Ed. 3. 26. F.N.Br.87.E.
 48 Ed. 3. 20. 11 Hen. 4. 12. Action brought by a Churchwarden
 of goods of the Church, &c. But an Executor may have an Action
 in such Case of his own possession, and as his own proper goods,
 without naming himself Executor, and without shewing the Testa-
 ment: but then the Declaration ought to be, that the Defendant
 took such goods Ipsius querentis, &c. So the property ought to
 appear to be in him: Wherefore it is not good as it is; and of
 that opinion was Williams Justice. But Fenner and Tanfield
 contra: Because he hath election to bring it either of his own
 possession, or as Executor; And although in the Original Writs,
 they use this course to speak de custodia sua, that is by reason of
 the form in such Cases used, and the Clerks in Chancery will not
 alter their course; But it is not of necessity: And in Declara-
 tions here, it is not necessary to be so strictly pursued: Where-
 fore, inasmuch as by the Testators death the possession is cast upon
 the Executrix, it is to be intended, that the goods were in custodia
 sua: and for that cause, the Declaration is good. And it was ad-
 judged for the Plaintiff against the opinion of Williams, ceteris ab-
 sentibus.

Woolmer *versus* Caston.

Ejectione firmæ. Of a Lease Fulmerston of Messua- (12)
 ges 3000 Acres of Land, 3000 Acres of Pasture in D. per
 nomina of the Hanoor of Monkhall, and five closes per nomina:
 The Defendant pleaded Not guilty, and the Jury give an espe-
 cial verdict, viz. quoad four Closes of Pasture containing by
 estimation 2000 acres of Pasture, that the Defendant was
 Not guilty: Quoad Residuum, They find the matter in Law;
 And it was now moved by Yelverton, that this Verdict was
 imperfect in all; for when the Jury find that the Defendant
 was Not guilty of four closes of Pasture, containing by estima-
 tion 2000 acres of Pasture, it is uncertain, and doth not appear
 of

Post. 183.
 Ante 31.
 Post. 653.
 3 Gr. 265.

of how much they acquit him, and then when they find quoad Residuum for the special matter, It is incertain what that Residue is; So there cannot be any Judgment given; And of that opinion was all the Court. Wherefore they awarded a Ven. fac. de novo to try that Issue.

Minors versus Leeford.

(13)

1 Rol. 51.42.
Hob. 331.
1 Cr. 572.
Ante 66.

Action for these words; Thou art a Thief, and hast stoln Master Saint George his Tree; After Verdict for the Plaintiff, it was moved in arrest of Judgment, that the words be not Actionable. For to say Thou hast stolen a Tree, an Action lies not; For it is not any Felony, for it is Arbor dum crescit; and of that opinion was the Court: And then when he saith, Thou art a Thief, and thou hast stolen a Tree, That shews the reason of his speech, which is not any slander; so no Action lies, &c. Tanfield 7 Eliz. in Stanleys Case in the Common Bench, this difference was agreed. Thou art a Thief, for thou hast stoln such a thing, the stealing whereof appears to be no Felony, an Action lies not; for the subsequent words shew the reason of his calling him Thief; But when he saith, Thou art a Thief, and thou hast stoln such a thing, which in it self is not Felony; yet the Action lies for calling him Thief generally; And the Addition, And thou hast stoln, is another distinct sentence by it self, and is not the reason of the former speech, nor any diminution thereof, but an addition thereto. And so he conceived here; and of that opinion were Fenner and Williams: But Yelverton doubted thereof, and (absente Popham) It was adjudged for the Plaintiff.

1 Rol. 51.
Yelv. 154.
3 Cr. 282.

Ante 66.
Hob. 77.
1 Rol. 42.

Post. 154.23.
424.

Termino

Termino Paschæ,

Anno quarto JACOBI Regis in Banco Regis.

Staynroyde *versus* Locock.

Assumpfit. For that the Defendant, in consideration of such a Sum payed unto him, assumed to assure such Copyhold Land to the Plaintiff in such manner as one Drables should advise; and alledges in fact that Drables advised, that he should make a surrender of that Land at the next Court of the Mannor, to the use of the Plaintiff and his Heirs, and should enter into an obligation of 40 l. for the enjoying of that Land against all persons: And alledgeth the breach, for not making that surrender, and for not becoming obliged according to the said order: The Defendant pleaded Non Assumpfit, and found against him: And it was now moved in arrest of Judgment, that this breach, in not entering into the obligation, was ill: And then Damages being given as well for that as for the other, no Judgment may be entered; and of that opinion was the whole Court: For the order which Drables made, that the Defendant should make an obligation of 40 l. is out of the Assumpfit; and therefore the other is not bound to perform it: And the breach being assigned in two things, whereof the one is not any cause of the breach of the Assumpfit, the Damages being given intirely, are intended to be given as well for the one as for the other: therefore ill. Wherefore Judgment was given for the Defendant.

(1)

Post. 571.

Co. 5. 108. a.

1 Cr. 327.

Post. 343.

Co. 10. 132. a.

Post. 194.

Symson *versus* Kirton.

TRespass. Upon Evidence, where one hath made his Will in writing; and devised his Land to Anne Hide and her Heirs; and afterward being sick and lying upon his death-bed (because Anne Hide did not come to visit him) affirmed that Anne should not have any part of his Lands or Goods. It was held by all the Court, That it was not any revocation of the Will, being but by way of discourse, and not mentioning his Will. But the revocation ought to be by express words, that he did revoke his Will, and that he should not have his Lands given unto her by his Will, or such like words which might shew his intent to make an express revocation thereof.

(2)

3 Cr. 51.

Post. 497.

Gregory *versus* Wikes.

(3)

Hob. 70. 77.

Assumpsit. Whereas the Defendant was indebted to the Plaintiff in 15 l. That the Defendant promised to pay it by 25 s. the Quarter, and to enter into Bond upon request for the payment of those Sums; and alledgedly request to enter into Bond of 30 l. for the payment of those Sums; which request was made after the end of the Quarter, after the promise: After Verdict for the Plaintiff, it was moved in arrest of Judgment, that this request to enter into Bond of 30 l. and refusal thereof, was not any breach; For there is not any promise to enter into Bond in any Sum certain; Sed non allocatur. For the Assumpsit being to enter into Bond, no Sum being mentioned: It is intended a Bond of the double Sum, which is the usual course betwixt parties, and after the Common Intendment; wherefore it is good enough. Secondly, because the request is after a Quarter past, which is not sufficient, being after the day of payment; For if there should be a Bond for the payment at a day past, it should be a forfeiture presently. Wherefore for this cause it was adjudged for the Defendant.

Green *versus* Austen.(4)
Yelv. 86.

Ante 42.

Yelv. 86.

Prohibition: To stay a Suit for Tythes; It was surmised to be a custom within the Parish, That the Parishioner should cut his grass and make it into Cocks, and set out the tenth Cock for the Parson, which was a discharge of the first and second vesture; And the Suit being for Tythes of the after-mowth by the Vicar, this prescription being alledged against him, he demurred thereupon, and it was adjudged a good prescription, and Bar against him.

Blunt & Farly *versus* Snedston, Mich. 2 Jac. Rot. 353.(5)
2 Rol. 411.1 Cr. 563.
Post. 395. 457.
Co. 5. 43. a.

Error of a Judgment in the Common Bench, in Ejectione firmæ: Where one of the Defendants pleaded Not guilty; and Verdict for the Plaintiff against both, and Judgment accordingly; The Error assigned was, because in the Ven. fac. *Constantinus Callard* was returned, and so named in the Distringas; but in the Pannel annexed thereto by the Sheriff *Constantinus Callard* was returned and sworn, and so was returned by that name upon the dole of the Postea: And this Error being assigned ore tenus, the Record of the Ven. fac. & Distringas being removed before, it was held to be manifest Error; for they be distinct names of Baptism, and there cannot be any amendment as this Case is: wherefore they were of opinion to reverse it, but gave day to advise from Hillary Term until this Term.

And

And in the mean time the Defendant in the Writ of Error obtained a Release of all Errors from one of the Plaintiffs in the writ of Error; And the first day of this Term pleaded it in Bar, as a Plea *puis d'aigne continuance*: And thereupon a Demurrer was entred in name of both the Plaintiffs in the writ of Error; For, In nullo est erratum being pleaded before; There could not now be any summons and severance; And it was now argued whether this Release of one of the Plaintiffs in the writ of Error, shall bar both, or none of them; For it was moved, that in regard the Action was in the personalty, the release of the one should bar the other: But all the Court after argument at the Bar resolved, that it should bar but him only who released it: For the Plea being by way of Action, to discharge themselves of damages which were recovered against them, and to be restored to the possession which was lost by the first Judgment; And they being joyned in the first Action by the act of the Plaintiff, and not by their own voluntary act: It is not reason, that the act of one should charge or prejudice the other: For then by such practice any one might be charged, and should not have any remedy to discharge himself: But if they had been Plaintiffs in the Record by their own act; As in debt upon an obligation, and had been barred in Judgment, In Error upon that Judgment, the release of one should bar the other: For as the one might have released the obligation, or discharged the principal Action; which should bar his companion wherein they are joyned Plaintiffs by their voluntary Act: So the release of the writ of Error by the one shall bar the other; But it shall not do so in the principal case, for the reason before alledged: wherefore it was adjudged that the Judgment should be reversed, quoad him who did not release; and that he should be restored to all what he lost: And quoad the other who released, That he should be barred in his writ of Error. Note, this manner of Judgment was entred by special direction of the Court. Vide 2 H. 4. 16. 11 Ed. 4. 8. 11 R. 2. Condemnation 16. And a Judgment, Pasch. 39 Eliz. Rot. 359. inter Razin & Ruddock.

3 Cr. 649.
Co. 6. 25. b.
Post. 616.

Hob. 304.

2 Cr. 648.
Co. 6. 25. a.

Osley *versus* Paradine, Trin. 3 Jac. Rot. 481.

DEbt, Upon a Lease for 21 years by John Paradine 31. Jan. 26 Eliz. from Christmas before, rending 20 l. per ann. at the four usual Feasts, viz. The Annunciation, Midsummer, Michaelmas, and Christmas, or at the end of one month after every of the said Feasts; who conveyed the Reversion by Common Recovery to Hugh Osley; who died seised, and this Reversion descended to the Plaintiff, who is yet seised of the Reversion at the day of the Bill purchased, which was 1. Feb. 2 Jac. and the Defendant being possessed of the Term by vertue of the said Demise.

(6)

Demise, there was 90 l. for four years and an half ending at Mich. 2 Jac. And for a month after the Feast, and yet is behind; Unde Actio accrevit, &c. The Defendant pleads to Issue, and found against him, and Judgment given for the Plaintiff: Whereupon he brought Error. The first Error; For that he declares of a Lease for 21 years made 31. Jan. 26 Eliz. beginning at Christmas before: And supposeth, that he is seised of the reversion, the day of the Bill, viz. 1. Feb. 2 Jac. which is false and repugnant in it self; For the Term ended by his own shewing, the Christmas before; then he cannot be seised of the reversion, nor the other possessed of the Term, the day of the Bill, so it is false and ill in it self. Wherefore, &c. Sed non allocatur; For although he cannot be seised of the reversion at the day of the Bill, yet he is seised at the time when the rent incurred, which is the cause of the action, and the other is but surplusage: wherefore it is well enough. Secondly, For that he pleads a Recovery (which is his Title) insufficiently, not shewing in what action. Sed non allocatur; For although the Recovery were imperfect, yet the Defendant being a stranger, cannot take advantage of any insufficiency therein: wherefore the Judgment was affirmed.

Post. 377. 550.

Crane & Hill *versus* Hummerstone.

- (7) **E**Rror of a Judgment in the Common Bench; The Error assigned, For that in trespass of Battery and wounding against two, the one pleads to all, except the wounding; That it was in his own defence, and to the wounding Not guilty; The other justifies all in his own defence: And in Issue upon those Pleas, The Jury found the first guilty of the wounding, and the other Issue against him also, and assesses damages 20 l. And found the Issue also against the other Defendant, and damages 100 l. and gave entire costs against both: And Judgment given accordingly of the several damages against them, and entire costs against both; and thereupon a Writ of Error was brought: The Error assigned was, because there ought to have been but one Judgment for the damages; and he ought to have made his election, against whom he would have taken his Judgment: And of that opinion was the whole Court, that this action is for one joyned Trespas, therefore one joyned damage ought to have been given by the Jury against both: And although the Defendants had severed themselves in Plea: yet when they are found both guilty of one and the same Battery; one Judgment only ought to have been given: Wherefore for this cause it was reversed.

1 Cr. 55. 243.

Post. 349. 385.
3 Cr. 860.
Hob. 66.

Co. 11. 7. 2.
1 Cr. 243.
Post. 252.

Scarro *versus* Saprany, in the Exchequer-Chamber.

Error, in the Exchequer-Chamber, of a Judgment given in the (8)
 Kings Bench: Where in Covenant, the parties were at Yelv. 19.
 Issue, and found for the Plaintiff, and Judgment accordingly;
 And Error was assigned ore tenus (For it was not assigned of Re-
 cord) That the Jurors appeared, Qui electi, triati, & Jurati dicunt
 super Sacrament. suum quod, &c. And found the Issue for the
 Plaintiff; For that the Entry ought to have been, Qui ad verita-
 tem de infra contentis dicend. electi triati, & jurati, dicunt, &c. And
 the words (ad veritatem de infracontentis dicend.) are omitted; Post. 207.
 And it doth not appear that they were sworn ad inquirendum of the
 point in the Issue; Ideo male, as in 2 R. 3. Electi, Triati was
 omitted, and held to be ill: But it was moved, that it was but
 matter of form; For when the Jury find the point in Issue, it ap-
 pears that they were sworn ad inquirendum of the point in Issue;
 And if it were material, yet it is amendable by the Statute of
 8 H. 6. Because it is but the default of the Clerk in not entring
 thereof; And of that opinion was Fleming Chief Baron: But all
 the other Justices and Barons against it, that it was material, and
 not amendable: Wherefore for this cause it was reversed.

Termino

Termino Trinitatis,

Anno quarto JACOBI Regis in Banco Regis.

Sill *versus* Heath.

(1)
Yelv. 72.
Ante 80.

Post. 158.

Action for these words, You did most perjuredly present me at such a visitation before such an Ordinary ; After Verdict, upon Not Guilty pleaded, It was moved in Arrest of Judgment, that an Action lay not for these words : And of that opinion was the whole Court : Because it doth not appear that he was sworn, nor what he swore, so as he might commit perjury ; Nor that it was in any judicial proceeding : Wherefore it was adjudged for the Defendant.

Price's Case.

(2)
3 Inst. 164.
Co. 5. 99. a.
Post. 212.

*for an
Explanation of this
vide Hawk. P.C.
B. 1. c. 63. s. 19.
p. 179.*

Price was indicted upon the Statute of 5 Eliz. of perjury, because he was produced as a witness for the King, upon a trial in an information, and sworn, &c. shewing the Oath, and the falsity therein ; And exception was taken, That a witness being produced and deposed for the King, may not be punished by way of Endicement, which is the Suit of the King merely : For he cannot punish his own witness who swears for him : And it was said to be so resolved in the Star-Chamber, That a Bill there lies not against him upon that Statute. And of that opinion was the whole Court, that such a witness is not punishable by way of Endicement : Whereupon he was discharged.

Stork *versus* Fox, Mich. 2 Jac. Rot. 431.

(3)
2 Rol. 54.

Post. 263.

1 Cr. 151.

Ejectione firmæ. Upon a special Verdict, the Case was ; There being two Wills, viz. Walton and Street in the Parish of Street, a Fine was levied of such Lands in Street, and whether the Lands in Walton did pass by that Fine, was the question, the action being for them only : And adjudged that they should not pass : For Street being a distinct Will by it self, and Walton being a distinct Will by its self, and so found by Verdict : Although Street the Parish comprehends both, yet in the Fine, the Lands in Walton shall not be said to be comprised, unless Walton had been an Hamlet of

of Street; And that the Fine had been levied of Lands in the Parish of Street; Then all had well passed: Wherefore it was adjudged accordingly.

Doctor Laughton *versus* Gardener.

DEbt upon the Statute 14 H. 8. cap. 5. by the Plaintiff, as President of the Colledge of Physicians in London, and of the Corporation of Physicians there: For that the Defendant used the Art of Physick in London, without Licence from the Colledge there, against the Statute, and their Charter: For which he demanded 5 l. for every month, being the penalty given by the Statute; The Defendant pleaded the Statute of 34 H. 8. which inables every one to practise Physick or Surgery, being skilful therein, notwithstanding any Act to the contrary. The Plaintiff replies, and shews the Statute primo Mar. cap. 9. which confirms their Charter, and every Article thereof to stand in force; Any Act, Statute, Law, or Custom to the contrary notwithstanding. Hereupon the Defendant demurred; First, because this general clause in this Law doth not restrain the Statute of 34 H. 8. Secondly, that this pleading is a departure: For it ought to have been shewn before. Stephens argued for the Plaintiff. First, That the Act of 34 H. 8. is repealed by the Statute of Prim. Mar. Quoad the Colledge of Physicians in London, as fully as if it had been by expresse words recited and repealed: For when it confirms the Charter of 14 H. 8. and appoints, that it, and every part thereof shall stand, and be available: the Statute of 34 H. 8. cannot stand with it, Quia leges posteriores leges priores contrarias abrogant, 4 Ed. 4. Porters Case, Co. 1. fol. 25. b. Secondly, That it is not any departure; Because there is not any new matter: but matter pleaded in reviving of the former, or fortification thereof; And a Record was shewn, Mich. 10 & 11 Eliz. betwixt Bomelins &.... where the Record was in the same manner as this Record is; And there the Plaintiff had Judgment: Wherefore, &c. And there being none on the Defendants parts to argue, The Court upon hearing of the Record, gave rule, that Judgment should be entered for the Plaintiff, unless, &c.

Reignold Nicholas *versus* Sir John Chamberlain.

TRespass, It was held by all the Court upon Demurrer, that if one erects an House, and builds a Conduit thereto in another part of his Land, and conveys water by pipes to the House: And afterwards sells the House with the appurtenances, excepting the Land, or sells the Land to another, reserving to himself the House: The Conduit and pipes pass with the House; Because it is necessary & quasi appendant thereunto; And he shall have liberty by Law to dig in the Land for amending

amending the pipes, or making them new as the case require : So it is, if Lessee for years of an House and Land, erect a Conduit upon the Land, and after the term determines, the Lessor occupies them together for a time, and afterwards sells the House with the appurtenances to one, and the Land to another : The Lessee shall have the Conduit and the pipes, and liberty to amend them : But by Popham, If the Lessee erects such a Conduit, and afterward the Lessor during the Lease sells the House to one, and the Land wherein the Conduit is to another, and after the Lease determines : He who hath the Land wherein the Conduit is, may disturb the other in the using thereof, and may break it : Because it was not erected by one who had a permanent Estate, or Inheritance, nor made one by the occupation and usage of them together by him who had the Inheritance : So it is, if a Disseisor of an House and Land erects such a Conduit, and the Disseisor re-enter, not taking Consuance of any such erection, nor using it, but presently after his re-entry, sells the House to one, and the Land to another ; He who hath the Land, is not compellable to suffer the other to enjoy the Conduit : But in the principal case by reason of the mispleading therein, there was not any Judgment given.

Radford *versus* Harbyn.

(6)

T Respals ; For taking and carrying away of an hundred load of wood : The Defendant justifies ; For that J. S. was possessed of them ut de bonis propriis, and the Plaintiff claiming them by colour of a Deed of Gift of them afterward made, took them ; and the Defendant retook them ; And it was thereupon demurred : Because the colour given to the Plaintiff, is a good Title for the Plaintiff, and confesseth the interest in him ; For colour ought to be such a thing, which is good colour of Title, and yet is not any Title ; As a Deed of a Lease for life, because it hath not the Ceremony, viz. Livery ; So grant of a reversion without Attornment is not good : But a Deed of goods and chattels, without other act or ceremony is good : So of colour by a lease for years or by Letters Patents, it is not good ; because they make a good title in the Plaintiff : And of that opinion was all the Court : Wherefore, &c.

Post. 319.
Co. 10. 91. b.

Dent *versus* Oliver, ante Mich. 2 Jac.

(7)

T Respals : Quare vi & armis apud Manerium suum de Hallington erexit quoddam velabrum, Anglice a Coll-booth, & vi & armis cepit Tolnetum, & ad tunc & ibidem insultum fecit super J. S. servientem suum, and disturbed him in gathering Coll *ad feriam ipsius le Plaintiff spectant*. The Defendant pleaded Not guilty, and found against him : And after Verdict it was moved in arrest of Judgment ; For that it is, vi & armis erexit velabrum, &c.

Whereas

Whereas it cannot be vi & armis. Sed non allocatur : For thereby the Land is broken by pitching therein : And although it is not said Clausum fregit, yet it is good enough, and punishable, as a Trespass for erecting a Booth, although it be not any breach of the soil. Secondly, For that he makes not any title in his Declaration, viz. By shewing, that he had a Fair by prescription, nor that he had Toll by prescription belonging to his Fair. Sed non allocatur : For it is a possessory Action, and is a sufficient possession against a stranger, without making any special title. Thirdly, For that it is quod vi & armis he took Toll, which cannot be ; But it ought to be an Action upon the Case ; Sed non allocatur : For as well the one as the other Action well lies, as 11 H. 4. & 11 Ed. 3. tit. Trespass are. Fourthly, For that this Action is brought for the Assaulting of his Servant, which lies not without Batter y, per quod servitium amisit. Sed non allocatur : For it is not brought for the Assault, but because by that means he was disturbed in the collecting the profits of his Fair : Wherefore it was adjudged for the Plaintiff.

Ant. 43.

1 Cr. 138.

Ant. 86.

Post. 673.

F.N.Br.91.G.

The King against Champion.

Error of a Judgment given in the Common Bench in a Quare Impedit for the Church of Moreton Valence; The sole Question was, whether a double usurpation shall put the King out of possession, and put him to a Writ of Right of Advowson. And against the opinion of Anderson, It was there adjudged, That the King was put to his Writ of Right and could not maintain a Quare Impedit : But now the Error being assigned in matter of Law ; After divers motions, the Court resolved, That the King may well maintain a Quare Impedit : For the King hath such Priviledge, that he cannot by any Act be put out of his Inheritance, unless by his own Patent : And as he cannot be outed of his Inheritance concerning Land ; so he cannot be outed of an Advowson : But usurpation upon him, and plenerty shall bind him quoad the possession, until he remove the Incumbent by Quare Impedit : For reason requireth that the Church be served ; And one being in by presentment, and according to the Ceremonies of the Church, cannot be put out without Action. And as it is agreed, That a Stranger cannot put the King out of possession of an Advowson ; but that it is in him to grant or dispose thereof : By the same reason a second presentation shall not gain any possession, nor twenty presentations ; but that he always remains leased, and in possession of the Advowson : For there ought to be a time when one may say, that a party hath gained possession against the King ; And if he cannot gain it by the first : Then the King remaining in possession, after the first presentment, and plenerty thereby, there is no more outed from by him the second than by the first,

(8)

2 Rol. 371.

Co. 6. 30. a.

Ante 53.

Moor 338.

Yelv. 90.

Ante 54.

Yelv. 91.

Hob 242.

Moor 338.

Co. 6. 30. a.

Co. Lit. 344. b.

Post. 385.

3 Cr. 519.

Co. 6. 30. a.

and by consequence he is not outed by twenty others : And Pop-
ham said, it was so resolved, Mich. 38 & 39 Eliz. in Husseys Case ;
That two or three usurpations upon the King, doth not gain such
a possession against him, but that the Abbowson remains always
in him, which he may grant, and upon Avoidance, may present
thereto, and maintain a Quare Impedit upon disturbance ; And
although it hath been said, that in Yeardleys Case (which was
adjudged 25 Eliz.) The Queen was not put out of possession by
a double usurpation : but maintained a Quare Impedit, and was
not put to her writ of right of Abbowson) The Record doth not
mention any Induction upon the second presentment ; so as there
was not any plenarty against the King : yet Popham and Tan-
field said, they well remembred the case was then argued, as if
there had been Induction : And then the Court did not conceive
but that Induction was fully pleaded, and yet resolved, that it
should not bind the Queen, and gave Judgment accordingly ; And
so the Lord Anderfon hath reported it : Wherefore they all here re-
solved accordingly ; And Judgment was reversed, Fenner, consen-
tiente, sed hæsitanter.

Mathewson *versus* Nicholas Rowe, Mich. 3 Jac.
Rot. 343.

(9)

ERror of a Judgment in the Common Bench in Debt upon
a Lease for years, and declares of a Lease of a Messuage
and Farm vocat. Muswell Ferme in Clerkenwell in Comit.
Midd. ac omnia, domos, ædificia, &c. & Hereditamenta eid. Mes-
suag. pertinent. jacent. & exist. in Muswell, Hornezey, Finchley
& Clerkenwell, vel eorum aliquib. in dicto Comitatu Midd. Ac
omnia sepealia, claus. & parcellas terræ in Muswell, Hornezey,
Finchley & Clerkenwell, vel eorum aliquib. in dicto Comitatu
Midd. dicto Messuagio spectant. vel cum eod. dimiss. viz. Totum
illud clausum prati vel pasturæ vocat. Hillyfield, &c. Habendum for
21 years rendering 80 l. per ann. And for rent arrear for a year he
brings his Action ; The Defendant pleads Non debet, and found
against him, and Judgment accordingly ; And the Error assigned
was : Because the Declaration is uncertain ; For that it ap-
pears not, in which of the Wills the Land lay. For the Decla-
ration is of a Lease of the Lands in those Wills, vel earum aliqua.
Also, he declares of the demise of a Close, of Hedow vel pas-
turæ, which is uncertain. Sed non allocatur ; For in a Decla-
ration wherein no Land is demanded, nor to be recovered,
It is sufficient, if the Declaration be as general as the words
of the demise ; For it is grounded upon the contract : Where-
fore the Declaration may be accordingly ; But in an Ejecti-
one firmæ, where possession is recoverable ; There the certain-
ty of the Land ought to be shewn, and in what place it lies :
For

1 Cr. 189.
Post. 171.

Co. II. 55. a.

For an Ejectione firme de uno Messuagio five Tenemento hath been ruled to be ill: And it was said, that for the point in Question in Sir William Reads Case, such a Declaration was adjudged good. Wherefore the Judgment was affirmed. And the same Term in the Exchequer-Chamber before the Justices and Barons such a Writ of Error was depending upon a Judgment given in the Kings Bench upon such a Declaration, which was verbatim as this Record is; and there the Judgment was also affirmed. And it was there held, that if one lets all his Lands in the County of Middlesex and Essex. A Declaration in his debt upon this Lease, viz. that he demised unto him all his Lands in the Counties of Middlesex and Essex, without mentioning any Aill wherein any of them lies, is good enough; And they said, that if the declaration had not been good, yet when he declares of a Lease made at the Ward and Parish of Bow in London, of Land in Middlesex, and the Defendant pleads thereto Non debet, this makes the declaration to be good. For the trial shall be now at London, and the place where the Land lies is not material, as in the Case of 18 Ed. 4. A man declares of a Lease for years, and doth not shew the place where it was made, it is ill: yet if the Defendant admits it, and pleads a surrender, now the declaration is made good. Wherefore here, &c.

3 Cr. 186.
Post. 621.

Post. 370.

Hob. 82.
3 Cr. 906.
Post. 139. 365.
482. 668.

Memorandum: This Term Sir Edward Coke the Kings Attorney, of the Inner-Temple, was made Chief Justice of the Common Bench. He was sworn in Chancery as Serjeant, and afterward went presently into the Treasury of the Common Bench; and there by Popham Chief Justice his Party Robes were put on; And he forthwith the same day was brought to the Bar as Serjeant; And presently after his Writ read and Count made, he was created Chief Justice, and sate the same day, and afterwards rose and put off his party Robes, and put on his Robes of a Judge. And the second day after went to Westminster with all the Society of the Inner-Temple attending upon him. (10)

Cockson *versus* Cock, Pasch. 4 Jac. Rot. 607.

Covenant. Against the Defendant Assignee of Dalton: For that upon an Indenture of Demise Dalton covenanted for himself, his Executors and Administrators to leave 15 Acres every year for Pasture absque cultura; And that he granted his Estate to the Defendant, and that the Defendant non reliquit 15 acras ad Pasturam, but such a day and year plowed up all. And upon this Count it was demurred, because the Assignee not being named, it is not any Covenant which shall bind the Assignee, for it is collateral. But all the Court held, that this Covenant is to be performed by the Assignee, although he be not named: because it is for the benefit of the Estate, according to the (11)

Co. 5. 16. d.

the nature of the Soil; But to do a collateral covenant, as to build de novo, or such like, shall not bind him, unless named. Wherefore it was adjudged for the Plaintiff.

Johnson *versus* Sir John Aylmer, Mich. 3 Jac. Rot. 1943.

- (12) **A**ction: For that the Defendant Hæc falsa & scandalosa verba sequentia dixit & publicavit, viz. Mr. Price, you do my Lord Burleigh wrong, that you do not apprehend Jeremy Johnson (*innuendo* the Plaintiff) for a Felon, and seise his goods; For he (*innuendo* the Plaintiff) hath stoln a Sheep from Wright of Rirsby (*innuendo* John Wright) The Defendant pleaded Not guilty, and found against him, and damages assessed to 50 l. And after Verdict, it was moved in arrest of Judgment, that the words be too generally laid to maintain the Action: For they be not alledged to be spoken of the Plaintiff, in the writ or Count; but only in reciting the words, he saith, innuendo the Plaintiff; And the innuendo without expresse alledging the words to be spoken of the Plaintiff, will not maintain the Action. And of that opinion was the Court: wherefore it was adjudged for the Defendant.

Co. 4. 17. b.

Harrold *versus* Clotworthy, Pasch. 4 Jac. Rot. 1356.

- (13) **D**ebt upon an Obligation, conditioned for the payment of a lesser Sum: The Defendant pleaded, *Tender al jour & tous temps pris*; The Plaintiff received the principal Sum in Court; and Judgment to acquit the Defendant of the Sum received. And the Plaintiff to have damages, alledgeth a demand of the money from the Defendant; And it was thereupon demurred and adjudged for the Defendant. For if the Plaintiff would have damages, he ought not to have received the money; but to suffer it to remain in Court. For after Judgment, *Quod eat inde sine die*, no Issue shall be taken.

Lashmer *versus* Avery, Hill. 3 Jac. Rot. 451.

- (14) **U**pon a special Verdict, the Case was; A custom of a Manor was found to be, that if a Copyholder in fee died seised, his Feme should hold it during her life, as *Frank Bank*: The Lord infeoffs the Copyholder, who died seised; whether she shall hold it, &c. And adjudged, that she should not. But if the Lord had infeoffed a Stranger of that Land, yet the Land remained Copyhold, and the custom is not taken away.

Post. 253.
Co. 2. 17. a.
Post. 574.

- (15) **N**ote, it was held by all the Court *inter* That eradicating of white thorns is wast; But *succidendo & vendendo* is no wast, unless it be laid, that they grew in pasture for defence of Cattel, and were of the greatnes of Timber.

Param

Paramor *versus* Chapman, Pasch. 3 Jac. Rot. 1036.

Replevin: The Defendant avows upon the Statute Infra feodum & Dominium upon a stranger; The Plaintiff saith, Non tenuit generally without alledging Tenure de aliquo, and Traverseth the Tenure alledged; And it was ruled to be ill, and for that cause Repleader awarded. And it was held, that the Plaintiff might have all Pleas which he might have at the Common Law, besides Disclaimer; For he might Traverse the Tenure, or plead *hors de son fee*: But he cannot plead Non tenure generally at the Common Law.

(16)
21 H. 8. c. 19.

Osborn & Bradshaw *versus* Churchman.

Osborn and Bradshaw were Sureties for one Churchman for the payment of money, and had counterbonds to save them harmless; the money was not paid at the day, and the Sureties paid it; And afterwards Churchman became Bankrupt, and whether they were Creditors within the Statute, was the Question. And it was resolved, that they were; And in this Case, in an Assise betwixt the Creditors and the Son of Churchman, It was found, that the Father by Indenture in consideration of love which he bare to his Son; and for natural affection unto him, bargained and sold, gave, granted and confirmed that land unto him and his heirs; This Deed was inrolled: The Question was, whether this land should pass; and it was held, it should not, unless money had been payed, or state were executed; For the Use shall not pass: But because the Son was then in possession, it was held to enure by way of confirmation.

(17)
13 El. cap. 7.
Post. 140.
Judg. Ref. 151.

Co. 4. 81. a.

Nowel *versus* Dier, Hill. 3 Jac. Rot. 840.

Action for words; The Defendant pleads quoad part of the words Non culp. quoad other part Justifies, by reason of a felony committed in the County of Somerset. The Plaintiff saith, de Injuria sua propria, One Ven. fac. was awarded in the County of Berk. where the Action was brought to try these Issues, and found for the Plaintiff, and Damages severally given; And for the Issue mistried the Plaintiff released his Damages and Action: And had Judgment for the other.

(18)
Post. 146. 264.
Ante 43. 95.
Co. 10. 131. a.

Crisp *versus* Gamel, Hill. 3 Jac. Rot. 609.

It was resolved, That where in an Assumpsit, two considerations be alledged, the one good and sufficient, and the other idle and vain; If that which is good be proved, it sufficeth; And

(19)
Post. 504.
Ante 119.
3 Cr. 149. 759.

And although he fails in the proof of the other, it is not material ;
Because it was in vain to alledge it ; and it is, as if it had not
been alledged.

Starling *versus* Long, Mich. 3 Jac. Rot. 1315.

(20) **T** Respass super Casum : The Writ was ad damnum 40 l. The
Count was ad damnum 60 l. After Verdict this variance
was shewn in arrest of Judgment ; Sed non allocatur. But it was
held, that he should not have more Damages than in the Writ ;
Post. 294.630. wherefore it was adjudged for the Plaintiff. Vide Trin. 3 Jac.
Rot. 1812. betwixt Church and Finch the like exception taken :
And adjudged as here.

Termino

Termino Michaelis,

Anno quarto J A C O B I Regis in Banco Regis.

NOte, That the first part of this Term was adjourned, *viz.* from *O^{ct}abis Michaelis* unto *Mense Michaelis* propter *Pestilentiam*; and at *Mense Michaelis* none of the Court sate, until *quarto die post*. (1)

Wood *versus* Smith.

Action *sur Trover* of divers goods, (naming them particular-ly,) and converting of them; The Defendant pleaded Not guilty, and found against him, and damages assessed to 40 l. And it was now moved in arrest of Judgment; First, that the Action is brought, of divers things by an Administrator, of goods of the Intestates found and converted: And it appears that parcel of those goods are things fixed to the Freehold, and as parcel thereof, for which this Action lies not; and divers parcels of them are insensibly alledged, and there be not any such words in Latine or otherwise for them; and the Damages being entire, there ought not to be any Judgment: For the Declaration is, that he was possessed de duobus Articulis, vocat. Portal cum suspensis, vocat. Hinges, & de uno molendino vocat. an Hand-mill, Et de uno plumbo vocat. a Lead, Et de una Alveola vocat. a Washing-fat, and lost them, &c. which things appear to be fixed to the house, and are as parcel there, and be not accounted as Goods, so the Action lies not for them; for the Portal is a door of the house; and the Hand-mill and the Lead (which is a brewing Lead) and the Washing-fat (which is parcel of the Brewing vessels) are always fixed things, and go to the Heir, and not to the Executor; as 20 H. 7. is: Sed non allocatur; for it is alledged in the Declaration, that he was possessed of them, ut de bonis propriis; and it may be that those things were severed from the Freehold, and things lying by; and it shall be so intended, when the Plaintiff so declares: And the contrary appears not to the Court by any matters shewn unto them by the Defendants plea. Secondly, for that he declares de quatuor Ollis æreis, vocat. Brass pots, where it ought to be Ollis ahenis, for there is not such a word as æris: Sed non allocatur; for when it is added, vocat. Brass-pots, that is as much as to say, Anglice Brass-pots, which the Court knows, was intended, which although it be not in congruous Latine, or in apt words for it, yet it is good enough; and of such nature were divers other things in the Declaration; but they had all one answer. Thirdly, because he declares

declares that he was possessed de uno Spadone, una equa pretii 53 s. 4 d. So there is not any price at all for the Gelding; and for that cause Popham and Yelverton held the Declaration to be ill: For to every thing there ought to be added the value, if it be a dead thing, and the price if it be alive; And forasmuch as this wanted thereof, they held it to be vicious. But Williams, Tanfield and Fenner è contra; for they said, it was not of necessity, especially where the thing is not demanded, but damages for it. And therefore Williams cited the Register, fol. 37. that such exception at the Common Law was not material: But they held, that at the most it was but default of form, which is aided by the Statute of 18 Eliz. But the other Justices denied it, and said, it was substance and not form only: But afterwards upon viewing the Roll in Court, although the Record of Nisi prius was so, yet the Roll is de uno Spadone & una equa pretii 53 s. 4 d. So the price extends to both: wherefore they all held it to be good enough. Wherefore they awarded that the Record of Nisi prius should be amended according to the Roll; and it was adjudged for the Plaintiff. Note, there was a President cited, Trin. 23 Eliz. Rot. 723. That for wanting vi & armis in Trespass, it was resolved to be but form and not substance; and aided by 18 Eliz.

Marham *versus* Pescod, Trin. 1 Jac. Rot. 838. in C. B.

- (3) **E**rror of a Judgment in the Kings Bench, in an Action upon the Case, where the Plaintiff declared, Whereas he was bonus & honestus, &c. That the Defendant falsa & maliciose procured him at such a Sessions of the Peace before such Justices of the Peace to be indicted of Felony, for the stealing of a piece of timber from the Plaintiff, Et ea occasione capi, & apud Norwich to be imprisoned until coram J. B. & A. S. Justiciariis pacis & ad audiendum, &c. legitime acquietatus fuit: ad damnum, &c. The Defendant pleads, that he was possessed of a piece of timber, which was feloniously stolen from him by persons unknown, which was found in the Plaintiffs possession: Whereof he complaining to Serjeant Haughton being Justice of Peace, who examining the Plaintiff, and finding cause of suspicion in him that he had stolen it, committed the Plaintiff to prison, and bound the Defendant in a Recognizance to prosecute against the Plaintiff; For which causes he exhibited a Bill of Endowment thereof, and the Plaintiff was Endowed; which is the same conspiracy: The Plaintiff replies, de injuria sua propria absque tali causa; and Issue joyned thereupon, and found for the Plaintiff, and Judgment accordingly; And now Error brought thereof. The first Error assigned was, for that the Original Writ and Declaration varies; and in truth, there was one Original Writ which was certified upon this Writ of Error, which varied from the Declaration certified; But the Plaintiff had brought

another Writ, and did not declare upon the first, but declared upon the second Writ, which agreed with the Declaration; which writ was not certified: wherefore the Defendant in the writ of Error alledged Diminution, and had a Certiorari, whereby it was certified; which was held good enough by all the Court. A second Error assigned was, because the Plea in Barr is ill, and no Barr to the Action, and so the Issue joyned is not material, and then the Judgment thereupon is Erroneous: Sed non allocatur; For the Plea in Barr is good, for it is a good justification of his dealing, if it were true, as 8 Hen. 4. 6. & 31 Eliz. betwixt Knight and Jerome in the Kings Bench, it was held, that such a Justification was good. A third Error which was not assigned, upon Record, but ore tenus, that the Declaration was not good, was, because it is, that he was legitime acquietatus, and doth not say, Inde nec de Felonia prædicta; So as it doth not appear whereof he was acquitted: And conspiracy lies not, unless he shews that he was lawfully acquitted of the Felony aforesaid: And therefore Fitz. N. B. 114. and the presidents in the Book of Entries are, Quod legitimo modo inde acquietatus existit: Sed non allocatur; For true it is, so it ought to be in conspiracy, as all the Court agreed: But this Action being but an Action upon the Case, and for that he falso & malitiose procured him to be Endited, and caused his name to be called in question, and procured him to be imprisoned, and for that he had done it falso & malitiose; for this cause the Action was brought. And Tanfield said, he well knew this difference to be so agreed in the Case of Knight and Jerome in this Court after long debate and advisement; wherefore the Judgment was affirmed. Richardson was of Counsel with the Plaintiff in the writ of Error, and Jos Counsel with the Defendant; and he several days earnestly urged to have the Judgment reversed for this last Error. But it was adjudged, ut supra.

1 Cr. 91.
Post. 597. 277.
1 Rol. 765.

Moor 6. 600.
3 Cr. 134.
Post. 191.

1 Cr. 419. 286;
315.
Post. 230.
1 Rol. 114.

Christopher Gewen *versus* Samuel Roll, and Anne
his Wife Executrix of William Noble,
Hill. 3 Jac. Rot. 897.

DEbt: Upon an Obligation of a 1000 Marks made to the Plaintiff and one Thomas Gewen 20 Eliz. The Defendant pleads, that the said William the Testator was bound to the said Thomas Gewen 22 Eliz. in a Statute Staple of 2000 l. And shews, that the defeasance thereof was, Whereas he had covenanted to assure the Baron of Broddrige to the use of himself for his life, and after to the use of the Plaintiff and his wife in Tail, remainder to the right Heirs of William Noble; And that he would not charge the said Baron with Estates that should endure longer then his own life; That if he performed the said Covenant

(4)

venant, the Statute to be void, &c. And shews the breach of the
 Covenant, by an assurance of the said Land to George Noble his
 Son in Tail; So the Statute being broken the condition is in
 force, and avers, quod non habent, nec die Impetrationis billæ præ-
 dictæ habuerunt bona quæ fuere testatoris tempore mortis suæ in
 manibus suis administrand. præterquam ad satisfaciendum the said
 Statute; The Plaintiff replies, and shews the Statute of 27 Eliz.
 of fraudulent Conveyances, and that the first Indenture and de-
 feasance was in consideration of money; and that after the con-
 veyance to George Noble, he made an assurance to the use of him-
 self for life, and after to the use of the Plaintiff and his wife,
 according to the first Indenture; and that the conveyance to
 George Noble was to defraud him, and so void; and had not any
 continuance after the death of William Noble against him; and
 thereupon the Defendant demurred. And being argued at the
 Bar upon the matter of the replication, all the Court resolved,
 that the matter shewn therein doth not avoid the breach of the
 Statute: For although that estate is vendible by the Statute of
 27 Eliz. yet it is charged, to continue longer then his life, in the
 limitation, and therefore is a breach of the covenant, so the Sta-
 tute is forfeited. Then it was moved that the Bar is ill; First,
 because he pleads that he had not goods the day of the Will which
 were the Testators tempore mortis suæ; which is not good, because
 he may have goods liable to Debts, although they were not the
 Testators goods tempore mortis suæ: As if he had Lands devised
 to be sold for the payment of his Debts, which are sold; The
 money received is Assets, yet they were not bona Testatoris; So
 it is, where goods are taken from the Testator by Crespas, and
 Damages are recovered, they be Assets in their hands. And so
 is the book 7 Hen. 4. 39. And of that opinion was Williams. But
 all the Court besides held the contrary in this point; For the
 Bar is good to a common intent, and it shall not be conceived
 that they had such Assets, being special Assets, unless it were
 specially shewn: and denied the Book to be Law in that point;
 And they said, that all the presidents are in this manner, as it
 is here quoad that point, and Kemp and all the Clerks affirmed
 as much, 7 Hen. 7. 7. 3 Hen. 7. 8. 6 Hen. 7. 7. 5 Hen. 7. 14. A
 second exception to the Bar was, because he pretends that he
 had not, Nec die Impetrationis billæ habuit bona testatoris, &c. and
 doth not say nec unquam postea, which ought to be alledged by the
 rule of all the Books; For it may be that he had, after the Will,
 which might charge him. And it was held by all the Court to
 be an incurable fault; For all books and presidents direct, that
 the pleading ought to be so, and it is not aided, unless it be
 found by verdict that he had Assets the day of the Plea pleaded;
 Then that aids the fault in the Bar, and makes it not mate-
 rial; but it is not so upon Demurrer: And although the De-
 murrer be upon a replication, which is vicious; yet forasmuch

as the Bar is ill; the Declaration being good: And the Replication is only to avoid the Bar, which (as this Case is) needs not be avoided, because it is no Bar; And the Replication is not to intitle him to the Action; They held, although the Replication was ill therein, yet Judgment should be given against the Defendant: But where the Replication is, to intitle himself to the Action, and by the Plaintiffs own shewing in the Replication he hath not any cause of Action, there Judgment shall be against the Plaintiff, although the Bar be ill. As in debt upon an obligation, where the condition is to perform covenants, and the Defendant pleads performance, but pleads ill; And the Plaintiff replies, and shews a breach which appears to be no breach: The Defendant demurs, Judgment shall be against the Plaintiff; For the Court shall not intend any other breach or cause of Action then he himself hath shewn, which is not any; Wherefore Judgment shall be against him, and in this Case after divers motions, it was adjudged for the Plaintiff. Vide Co. 3. fol. 52.

1 Cr. 5;
Co. 8. 120. b;
133. b.
Post. 221. 312;

Hob. 14.
Co. 8. 133. b;

Parker's Case.

Parker and his wife brought a Writ of Error to Reverse an Endiament upon the Statute of 5 Eliz. of Perjury, and Outlawry thereupon: And the Error assigned was, because the Endiament recites the Statute of 5 Eliz. and misrecites it in hoc; That the Statute is, Quod quilibet attinctus de tali offensa shall lose and forfeit 20 l. The recital is, Quod quilibet attinctus, &c. admitteret & foris faceret 20 l. So it is Admitteret pro Amitteret, which is not sensible, nor agreeable with the Statute: And although it was said, That these words are Quasi Synonyma & de eodem sensu, and the one being well recited is sufficient: yet because they be both in the Statute, and the one is misrecited, It is ill, and there is not any such Statute recited: Wherefore for this cause, without hearing any of the other exceptions which were offered, because this fault was manifest; The Endiament was discharged, and the Outlawry reversed.

1 Cr. 238

Lady Waterhouse *versus* Bawde, Hill. 3 Jac. Rot. 663.

Action upon the Case: And declares, Whereas by the Statute 45 Ed. 3. cap. 3. Cythes ought not to be payed for gross trees; and by the Statute 32 H. 8. cap. 7. None ought to be sued for Cythes of gross Trees; that she had cut down such timber Trees being above the growth of 20 years, and that the Defendant as Parson sued her for Cythes of them against the said Statute. Upon this Declaration, it was demurred; For it was moved, when a Statute prohibits suing, and gives no special penalty: There action upon the case lies not for doing a thing against

(6)
1 Rol. 341

Post. 432.
Post. 356.
1 Rol. 34.
3 Cr. 836.
Hob. 206, 267.
Co. 4. 14. b.

against the prohibition of a Statute; As where a man distrains extra feodum, or in the High-way, &c. And all the Court held, that the Action lies not; For none shall be punished for suing in the Spiritual Court for any matter which is properly demandable there, although peradventure he hath not any cause of Action; But if he sues in the Spiritual Court for matter which appears by his Libel is not suable there, nor the said Court hath any Jurisdiction thereof, but the Common Law hath Jurisdiction, there Action upon the Case lieth; For it is a Suit for averation, and seeks to take away the Jurisdiction of the Courts of the Common Law: But if the Suit be there for a thing demandable and recoverable there, by any thing which appears by the Libel, and by the Defendants Plea, or by any collateral matter he is barrable there, no Action upon the Case lieth: And here although the Statute be, that none shall be compellable to pay Tythes of gross Tithes, yet it is lawful for the Parson to draw it in Question in the Spiritual Court, whether they were gross Tithes or not. And they held, that where a Statute prohibits a thing and adds no penalty; True it is, that an Action lies for doing against the prohibition of that Statute: But that ought to be by an Action brought tam pro Rege quam pro seipso; Because in such Case the King is to have a fine: And for that, this Action is brought only by the party, and not tam pro Rege quam pro seipso: Therefore they all held, although otherwise an Action might lie, yet for this cause it was not well brought: wherefore it was adjudged for the Defendant.

2 Inst. 55.

Post. 361.

Marler *versus* Ayliffe & Eylett.

- (7) **T** Respals; For taking of a Gun and Dagger from him: One of the Defendants justifies, because the Plaintiff assaulted J. S. with them; And in preservation of the Peace, and for safeguard of the life of J. S. he took them from the Plaintiff; and so Justifies: The other pleads Non culp. The Plaintiff replies against him who justified, *De son Tort Demeasn*; And this Issue was found for the Defendant: And the same Jury found against him who pleaded Not guilty, that he was guilty, and assessed Damages and Costs. And it was now moved in Arrest of Judgment, That in regard the Action was brought against both Defendants jointly, and the Justification is found for the one, the other cannot be guilty; And so no Judgment ought to be against him, notwithstanding this Verdict: But notwithstanding this Exception the Plaintiff had Judgment; For in that he is found guilty, and cannot take advantage of the Justification, the Action well lies; For it shall be intended, that he took it at another time without cause: But if the one Defendant justifies by the gift of the goods, so as he destroys the Plaintiffs title, and shews that he could not have cause of Action; which

1 Cr. 178.

Hob. 54.
Post. 251.

which is found accordingly for that Defendant, although the other Defendant be found guilty, yet no Judgment shall be against him; because it appears to the Court he had not any cause of Action: Wherefore it was adjudged for the Plaintiff.

Bostock versus Snell.

Error was brought in the Erchequer-Chamber of a Judgment in this Court in Debt for Rent; which (and all other Writs of Error depending there) were discontinued by the not coming of the Justices, the Term being adjourned propter pestilentiam in London; And the adjournment did not extend unto them: Now a new Writ of Error, Quod coram vobis residet, was brought; And forasmuch as this Writ was brought after the Statute of 3 Jac. to stay Execution in Debt; It was prayed, that according to the said Statute he might have execution, or that the party should put in Sureties to pay the Condemnation: But upon consideration of the Statute, all the Justices held, that it was out of the Statute; Because it is not an Original Writ of Error, but it is in lieu of a former Writ, upon which the Record was removed before the Statute: And it being discontinued, not through default of the party, it is not reason he should be prejudiced thereby. Wherefore it was resolved, that this case was out of the Statute 3 Jac. cap. 8.

(8)

1 Cr. 575
Post. 384.
Post. 620.

1 Cr. 591

Sir Christopher Hilliard versus Redner.

Sir Christop. Hilliard Executor of Sir Christop. Hilliard, brought Debt against Redner as Son and Heir of Redner, and recovered by Default in the Common Bench: Error being brought, was assigned, because there wanted a Warrant of Attorney for the Plaintiff; And the Warrant of Attorney was certified in this manner, viz. Cristoph. Hilliard miles po. lo. suo J. S. attornatum suum versus Joh. Redner: And it was moved, that this was not any sufficient Warrant of Attorney; Because he is not named Executor, &c. But it was held, that it was well amendable; and it should be intended to be in this Action, because there is not any other Action depending: wherefore it was awarded to be amended, and the Judgment was affirmed.

(9)

1 Rol. 289.

1 Rol. 289.

Post. 354.

Osbourn versus Rider, Hill. 3 Jac. Rot.

Ejectione firmæ was brought upon a Lease made 1. Jan. 3 Jac. Habendum a dato Indenturæ prædictæ. And the Ejectment was the same day. After Verdict for the Plaintiff, it was moved in Arrest of Judgment, that this Lease being made, Habendum a dato Indenturæ prædictæ, is as much as to say, from the day of the date; as it is held in Cleytons Case, Co. 5. fol. 1. Then the Eject-

(10)

Co. Lit. 46. b.

Post. 264.
Post. 268.
Moor 40.
Ant. 96.

Ejectment being the same day, it is ill alledged: But all the Court resolved, that the date is the time of the delivery, and it differs from the time or day of the date: Wherefore the Ejectment alledged postea the same day, is good enough. And it was adjudged for the Plaintiff.

Williams *versus* Cutteris, Pasch. 43 Eliz. Rot. 88.

(11)
3 Cr. 850.
1 Rol. 903.

SCire fac. against an Executor, Quare Executionem habere non debet, upon a Judgment in Debt against the Testator: The Defendant pleaded, that the Plaintiff sued Execution against the Testator by Capias ad satisfaciendum, and had his body in Execution, who died in prison; and demand Judgment Si Actio, &c. And it was thereupon demurred; Because this Execution is not any satisfaction: And it was prayed inasmuch as he did not plead, that satisfaction was given, therefore Execution might be awarded. But Tanfield and Yelverton, ceteris Justiciariis absentibus, held, that the Bar was good: For when the body of the party is taken in Execution, although it be not in it self any satisfaction, yet as to him, there cannot be any other Execution: But if two had been condemned, although the one of them dies in Execution, that is not any discharge for the other, because the Execution is against both; and it is not satisfaction until the condemnation be satisfied: Yet when Execution is against one only, the Judgment being against one only: When he dies, no other Execution can be against his Goods or Lands, then was in his life time; wherefore they held the Bar to be good. But because it was a new case, and had not formerly been adjudged, they would be advised. Et Adjournatur. Vide Postea.

Hob. 61.

Post. 143.
3 Cr. 850.
Hob. 59.
Co. 5. 86. b.
1 Rol. 903.

Co. lib. 5. 87. a.

Post. 143.

Lady Lane *versus* Pledall.

(12)

DEbt upon an obligation which was set forth to be made 15. Nov. 25 Eliz. The Defendant pleaded Non est factum; The Jury found a special Verdict, viz. That it was dated 15 Nov. 23 Eliz. but was not sealed or delivered until the 18. Nov. 26 Eliz. Et si super totam materiam, the Court shall adjudge it for the Plaintiff, they find for the Plaintiff, Et si, &c. And it being hereupon moved, all the Court without any difficulty resolved, that this Verdict is found for the Plaintiff: For the Issue being generally Non est factum, it appears to be his De'd. But peradventure by special pleading he might have helped himself: wherefore it was adjudged for the Plaintiff. Vide Co. 2. fol. 4. Goddards Case.

Hob. 249.
Post. 264.
Hob. 73.

Hawkes *versus* Brayfield.

Prohibition: To stay suit for Tythes, and surmisseth that the Lord Shandois was seised in Fee of a Capital Messuage and Demeasne Lands thereto appertaining in the Parish of D. and that he agreed with the Defendant being Parson of D. in consideration of 10 l. to be Annually payed by the Lord Shandois to the Defendant during their joynt lives and his continuing Parson, in satisfaction of all Tythes growing upon the said Lands, that he, his Farmers and Tenants of the said Lands should be discharged from the payment of Tythes of those Lands, and should retain the Lands without payment of any other Tythes: And shews that the Lord Shandois payed the 10 l. annually according to that agreement; And that he is Farmor of that Land to the Lord Shandois; and that the Defendant notwithstanding this Agreement, sued him for Tythes: And upon this Declaration made, and a motion thereupon, without any argument; The Court held, that it is not a sufficient surmise to maintain a prohibition: For an agreement to be discharged from Tythes, may be for a year by *parol*, and shall be good; But to have such an Agreement during the Parsons life, or for years, cannot be without Deed. And although it were objected, That this agreement being in way of Contract, by Retainer, is not any Lease of them, but only a Contract, (which may be for many years by way of discharge to the party himself who ought to pay them, by retaining them without payment, as well many years as one year) yet the Court held, That it could not be, because the Law will permit it for a year; It being quasi by way of sale: But for many years, (which sound in nature of a Lease) it cannot be. And Tanfield said, That such a surmise was in a Case betwixt Nelson and Prentiman, to be discharged for years, and ruled to be void; a *multo fortiori*, To be discharged during the Parsons life; And such a Case was ruled betwixt Rolls and Rolls. Wherefore without further argument it was adjudged for the Defendant, and consultation was awarded.

(13)

Hob. 176.

2 Rol. 63.

Yelv. 94.

Yelv. 94.

Hob. 176.

2 Rol. 63.

Post. 669. 6131

Yelv. 95.

3 Gr. 249.

Yelv. 94.

2 Rol. 63.

Yelv. 95.

Normanville *versus* Pope, Hill. 3 Jac. Rot.

DEbt: Upon a Bill obligatory of 40 l. to be payed within ten days after, John Lepton went by five days undivided from London to York, and returned from York to London; and alledges in fact, That 18. May, 3 Jac. he went from London to York, and by five days undivided went from York to London, and from London to York; And that the Defendant licet *sepius requisitus*, &c. had not payed the 40 l. &c. The Defendant pleaded, that Lepton did not go by five days immediately from London to York, and return from York to London - prout, &c. And Issue being there:

(14)

1 Rol. 463.

2 Rol. 603.

1 Rol. 463.

thereupon, and a Ven. fac. awarded from the Parish of Bowe, in Warda de Cheap in London, where the Bill was alledged to be made; and found for the Plaintiff: It was now moved in arrest of Judgment; First that this Bill is not payable, but at ten days after notice of his going and returning, &c. And here there is not any notice alledged to be given of his going and returning: And licet sapius requisitus will not serve. Secondly, because the Ven. fac. ought to have been of London and York: and not of the one only. And for that both could not join, It ought at leastwise to have been of London generally, so de corpore comitat. and not of the Parish only where the Bond was made: Also Popham said, the Bar was not good, nor the Issue well joyned: For he ought to have taken Issue upon one of the days only, at his peril, and not to have shewn the journey by every day in the Issue: Wherefore for these causes they would advise. Et adjournatur. Vide Residuum postea 150.

Vaughan *versus* Loriman and others.

- (15) **E**rror brought of a Judgment in the Common Bench in Faux Judgment given in Wibton super Wye, where an Assise was brought against five of 100 Acres of Land; and three of the Defendants were found Non Tenants, and acquitted of the disseisin; and two were found Disseisors quoad three Acres; and for the residue, the Verdict was found for the two Defendants; and yet the Verdict entered for 100 Acres, and Judgment given accordingly: And for this cause Faux Judgment was brought, and abetted by the Statute of 1 Ed. 3. 4. That the Verdict in a bafe Court was entered in another manner then it was given by the Jurors; and thereupon the Defendant in the Writ of false Judgment demurred, and adjudged against him: And of this Judgment, Writ of Error was brought, and the Error assigned, because the five Defendants sued the Writ of Faux Judgment, where three of them were acquitted and had not any loss: Wherefore they ought not to have joyned in that Writ, but it ought to have been brought by the two only. So the Judgment being given for them all, was erroneous. And it was held to be a manifest Error; And Judgment was therefore reversed, and restitution awarded unto him of the 100 Acres.

Sir William Read *versus* Th. Potter, &c. Trin. 3 Jac. Rot.

- (16) **E**rror of a Judgment in the Common Bench by Sir William Read, against Thomas Potter and his wife, Executrix of Sir John Rivers; for that they brought Debt upon an Obligation of 500 l. against the Defendant, as Administrator of Dame Gresham Executrix of Sir Thomas Gresham; And declared upon an Obligation made by Sir Thomas Gresham to the said Sir

Sir

Sir John Rivers, 1. Febr. 29 Eliz. And that Sir Thomas Gresham died 21 Eliz. and shewed that by an Act of Parliament, 16. Jan. 23 Eliz. It was enacted inter alia for the payment of his Debts; that Dame Gresham should have all his Lands, besides certain Lands in the County of Suffex, which should be to Sir Henry Nevil, his Heir: And that Sir Henry Nevil should be discharged of all his Debts; And that the said Anne Gresham oneretur cum toto pondere & onere solutionis debitorum dicti Thom. prout per actum prædictum plenius apparet. Unde Actio, &c. The Defendant pleaded, that in the said Statute it is provided; If she did not pay the debts of Sir Thomas Gresham before Pasch. 1583. that such Commissioners named in the Statute might sell the Lands of Sir Thomas Gresham, and pay his debts: And that all sums of money which should be raised by the sale of his Lands and Woods, and all the Goods and Chattels of the said Sir Thomas Gresham, and all his debts which should be received or might be received, should be Assets in their hands, &c. And pleads, that he had not any thing in his hands of any sum levied of the Lands, &c. to satisfie that debt: The Plaintiff replies, that the Defendant the day of the Writ had in his hands divers Sums of Money, coming of the sale of his Lands and Woods, and divers Goods, and Chattels, and Debts, Quorum aliqua fuerint prædicti Thom. Gresham at the time of his death, & alia quæ fuerint recepta vel recipi potuerunt by the said Anne, sufficient to satisfie that 500 l. And thereupon they were at Issue, and the Verdict found for the Plaintiff, that the Defendant had at the day of the Writ purchased, Diversa bona & Catalla, & debita, quorum aliqua fuerunt prædicti Thom. Gresham tempore mortis suæ, & alia quæ tempore actus prædicti fuer. recepta aut recipi potuerunt; sufficient to satisfie that Debt: And it was thereupon adjudged for the Plaintiff. The first Error assigned was, for that this Action is brought and grounded upon a Statute made at the Parliament 23 Eliz. and there was not any such Parliament, but a Sessions of Parliament begun 24 Eliz. And the Defendant in the Writ of Error thereto pleaded, that the Plaintiff ought not to be received to assign it for Error; Because he himself in his Barr saith, that by the same Act it is further provided, &c. So by this Plea he hath confessed, that there is such an Act. And it was thereupon demurred, and all the Court held, that it was admitted by the Plea, and therefore shall not be assigned for Error: Otherwise it had been a plain mispleading of the Act. Vide prim. Mar. Dyer 94. & 203. Plow. 79. in Partridges Case. A second Error assigned was, because the Plaintiff founded his Action upon the Statute, and recites only such part thereof, whereby he would charge the Defendant generally, whether he hath Assets or not: And it appears by the other part of the Act pleaded by the Defendant, That he is not chargeable, unless he hath Assets of the money received upon the

1 Cr. 560.
Post. 668.
Ante 125.
Ante 111.

Post. 506.

sale of the Land or Woods, or debts of Sir Thomas Gresham ; So the Statute is not fully recited by the Plaintiff : Sed non allocatur ; For the Plaintiff reciting what made for his advantage, the Defendant may plead the Residue if he will. Thirdly, for that the Plaintiff by his Declaration and recital of the Statute chargeth the Defendant as Administrator of Sir Thomas Gresham generally, whether he hath Assets or not ; and by his replication chargeth the Defendant, for that he hath Assets of the Goods and Debts left unto Dame Gresham : So he chargeth in special manner, which is a departure from the declaration ; Sed non allocatur ; Because he is charged as Administrator in the Detinet in the declaration, and that part of the Statute which is recited in the declaration, and that part which is recited in the Bar, are to charge him only as Administrator ; So it is all one in substance ; wherefore it is well enough pursuant. Fourthly, that the Replication doth not charge him according to the Statute ; For the Statute is, Quod bona & Catalla vel debita quæ fuer. Thom. Gresham tempore mortis suæ, aut sibi solvenda, & quæ recepta fuerunt, aut recipi potuerunt, reputabuntur pro *Assets* in manibus Annæ Gresham & Executorum vel Administratorum suorum ; And the Replication is, That the Defendant habuit die Brevis, &c. diversa bona & Catalla & debita (not naming what) Quorum aliqua fuer. prædict. Thom. Gresham tempore mortis suæ, (so shews but some of them to be Sir Thomas Greshams) Et alia quæ tempore actus fuerunt eid. Thom. solvend. & alia quæ tempore actus prædict. fuer. recepta, aut recipi potuerunt ; whereby the debts which were solvend. only, without alledging that they were received or could be received (for that comes in another distinct Clause afterwards) should be Assets ; which is against the Letter of the Statute, which is, that debts which were eid. Thom. solvend. & quæ recept. fuer. or recipi potuerunt, should be Assets ; and according to this Replication is the Verdict : So none of them is pursuant to the Statute : And then this Verdict being ill for part of the Assets found, is void for all ; For it doth not appear what they found to be Assets in certain, so the Judgment thereupon erroneous. But this Exception was not well approved by the Court ; But upon the first motion and reading of the Record over-ruled ; For the Verdict finding that he had Assets : That sufficeth whatsoever way he had them : And it shall be intended they found Assets generally, which is Assets according to Law. Fifthly, it was moved, That this Obligation being only a Counterbond to save harmless from another Bond, (as appears by the Condition which is entered,) and not for a mere debt, is not such a Bond as is within the intent of the Statute : Sed non allocatur ; For the Statute extends to all Debts, although it be not a Bond with a condition certain for the payment

Ante 127.

ment of money, but is to quodammodo; for it is to save harmless from a Bond for the payment of money: Wherefore rule was given, that Judgment should be affirmed. It was afterwards moved to the Court, that the Ven. fac. was returned in the time of Queen Eliz. and the Habeas corpor. juratorum was summoned in curia nostra, whereas it ought to have been in curia nuper Reginae, for there were not any Summons in the Kings Court; which was a manifest Error: As it was resolved in a Case in this Court, betwixt Sir Francis Knowls and Beckinghew, being a Case in the Exchequer-Chamber concerning the School of Berry: Wherefore it was prayed here, that Certiorari might be awarded to certify it; which was granted, (Popham absente.) But afterwards being moved for stay thereof, Popham being in Court, because it was in the discretion of the Court to award it or not, it being after a Nullo est Erratum pleaded, and in disaffirmance of a Judgment; Therefore they all agreed, that no Certiorari should be awarded, but that a Superfedeas should be made for the stay of that which issued before: whereupon the Judgment was affirmed.

Ante 6.
1 Cr. 351.

Catesby *versus* the Bishop of Peterborough and Baker,
Trin. 4 Jac. Rot. 1828.

Quare Impedit: The Bishop shews that one F. the last Incumbent of the Plaintiffs was deprived, and 24. Febr. gave notice to the Plaintiff, and because he did not present within the six months: He after the six months (viz. the 11. of August) collated the Defendant, who was instituted and inducted; The other Defendant being Incumbent, pleaded the same Plea; whereupon it was demurred. The sole Question was, whether the six months shall be accounted by 28 days to every month, or by the half year; For the Bishop collated after the six months accounting 28 days to a month only, but within the time of the half year. And it was resolved that the time shall be accounted by the half year according to the Kalender after the notice, and not after 28 days to every month: Wherefore it was adjudged for the Plaintiff.

(17)
Co. 6. 61. b.
Yelv. 100.
Post. 166.

Co. 6. 62. d. b.
Yelv. 100.
Co. Litt. 135. b.
Post. 166.

Batt *versus* Bradley, Trin. 4 Jac. Rot. 1131.

Trespas: Quare Averia sua cepit apud Kymb. and chased them, &c. The Defendant Justifies in such a Close for Damage Felant; The Plaintiff shews, that the place where was another Close, &c. Whereupon the Defendant demurred, pretending that the Plaintiff never made any new assignment. But where the Writ is, Quare clausum fregit, but the Court held

(18)

Hob. 176.

held the contrary : Wherefore it was adjudged for the Plaintiff.

Broughton *versus* Moore, Trin. 4 Jac. Rot. 959.

(19)

Post. 187.

Information ; for not coming to Church by such a time contra formam Statuti, for which he demanded the third part : And because there are three Statutes in this Case, and it doth not appear which, it was adjudged ill. And Coke said, It was so adjudged upon an Information against Talbot and others upon this exception.

Brediman *versus* Bromley, Trin. 44 Eliz. Rot. 88.

(20)

Co. 6. 56. b.

Co. 6. 57. 58.

Affise : For a Rent-charge devised unto him for life ; whereof he had Seisin by the hands of a Termer for years : And whether this Seisin were sufficient to maintain an Affise was the Question : And held by all the Justices, that it was not a sufficient Seisin. For it is a payment only, and not a Seisin ; For a Lessee for years cannot bind or charge the Freehold : And Coke Chief Justice gave five several reasons, that it could not be a Seisin to maintain an Affise. (1) In respect of the Imbecillity of the Estate which the Lessee for years hath. (2) Seisin is always in the realty. (3) Lessee for years by his possession may take Seisin for him in reversion ; But he cannot give Seisin : And Lessee for years, Bayly, or Guardian, may take Seisin, but they cannot give Seisin. (4) Because it is remediless ; For Tenant for years cannot make a Rent-lease to be good which was not good, viz. to have remedy for it : And redditus ficcus before Seisin is not Assets. (5) Divers inconveniences would ensue if it should be a Seisin ; but he did not shew what : Wherefore it was adjudged for the Defendant. 21 Hen. 6. 9. 2 Hen. 6. 1. 8 Hen. 6. 16. 8 Aff. 16. 8 Ed. 3. 53. N. B. 179. 4 Hen. 7. 14. 2 Hen. 4. 4. 39 Hen. 6. 2. 33 Ed. 3. Verdict 47. 49 Ed. 3. 8. 27 Ed. 3. 83.

Smith *versus* Batten.

(21)

Co. 7. 2. a.
Post. 446.
Post. 375.

Covenant in London : For not repairing of Hedges, and for not plowing of the Land in the County of Hartford. And upon Nihil dicit a Writ was awarded to the Sheriff of London, to enquire of the Damages : and the Damages was found, and the Writ returned ; And it was moved that the Writ issued erroneously, because it was not directed to the Sheriff of Hartford, where the land lay, and where the Damages were properly inquireable ; Sed non allocatur : Because the Covenant is founded upon a writing made in London, wherefore it was adjudged accordingly.

Termino Hillarii,

Anno quarto J A C O B I Regis in Banco Regis.

Burton *versus* Tokin.

Action for words: Whereas he is, and such a day (which was the day of the speaking) and for many years before was a Justice of Peace, That the Defendant spake of him these words; You are a sweet Justice, you sent your warrant for J. S. to be brought before you for suspicion of Felony; and afterwards sent J. D. unto him to give him warning thereof, that he might absent himself: After Not guilty pleaded, and found for the Plaintiff; It was moved, that these words were not actionable: But all the Court held, that the Action well lay; for it toucheth him in his Office to give such secret warning, to cause him to absent himself. Wherefore it was adjudged for the Plaintiff. (1)

Williams *versus* Cutteris, Quod vide ante fol. 136. was now moved again. And Popham, Williams and Tanfield held, that the Plea is good: For when execution is awarded against one person only, and by a Capias ad satisfaciendum his body is taken in execution, and is returned: It is an absolute and perfect execution against him, and no other execution can be against him, his Lands or goods: And although the Law saith, it is not any satisfaction in it self; yet it is so high, that there cannot be any other execution; and when he dies, the execution is determined as to him, and there cannot be any other execution of his goods or Lands: And not like to the Case where two are condemned, and the one is taken in execution and dies, yet execution may be against the other: because it is not any satisfaction, and process is not determined against the other, and the one is chargeable as well as the other: But where the one only is in execution and dies, the Executor is discharged, and there cannot be any new execution. Yelverton doubted thereof, because it is clear, that his body is but as a pledge for his debt, and is not any satisfaction in it self: wherefore he said, It was not reasonable that the party Plaintiff should be deprived of all his remedy by his death: But notwithstanding it was adjudged for the Defendant. Vide N. B. 246. b. 41 Aff. 15. 33 Hen. 6. 4. 3 Hen. 6. 7. (2)

Moor 858.
Co. 5. 87. a.
Hob. 59.
3 Cr. 850.
21 Jac. c. 24.

1 Cr. 75.
3 Cr. 850.
Post. 338.
Ante 136.
Post. 320.

Taylor *versus* Perkins.(3)
1 Rol. 44.1 Rol. 44.
3 Cr. 214.
Fosl. 430.
Hob. 219.

Action for these words, Thou art a Leprous Knave: It was demurred upon the Declaration, because the Defendant conceived an Action lay not for these words. But upon the first motion all the Court held, that the Action well lay: For they be as well actionable, as if he had said, Thou wast laid of the Pox: Wherefore without argument it was adjudged for the Plaintiff.

Molineux *versus* Christopher Molineux, Hill. 2 Jac.
Rot. 360.

(4)
1 Rol. 461.
614. 617.
2 Rol. 253.
698.

Ejectione firmæ: Of a Lease of Bridget Molineux apud Thorp, of an house and Lands in Thorp, Nec non de libera piscaria infra rivulum de Trent, habendum for thre years, &c. Upon Not guilty pleaded, it was found by special Verdict, That Sir Edward Molineux was seised of the said Tenements and Piscary in Fee, and held them in Socage, and made his Will in writing, whereby he devised in this manner; I Edward Molineux make my Will as concerning the disposition and order of certain Annuities or Rents to be issuing out of certain of my Lands and Tenements, as followeth: Whereas I have Lands in Thorp, &c. in the County of Nott. I will that my younger Children not married, viz. Ed. Thom. Christ. &c. shall have such several Annuities or Annual Rents as be expressed in several Writings signed with my hand, and sealed with my Seal, according to the true meaning of my said Writings: And whereas my said Lands are of greater value then the said Annuities, I will, that if my Heir after my decease truly pay the said Annuities, that then my said Heirs shall have the order and disposition of my Lands, as long as he shall perform my Will. And if my Heir do not perform my Will therein; then I will that my Executors and the Survivors of them, shall have the order and disposition of my said Lands to perform my Will, and my Son and Heir to have no meddling therewith, because he hath not performed my Will. And if there be default in my said Heir that my Will is not performed, and also in my Executors or the Survivors of them, that my Will is not performed: Then I will that all my said Lands shall be to my younger Children during their lives. And he constituted John his eldest Son, and the said Edward and Thomas, and two others his Executors, and died: The Jury find that he made a Writing of the Grant of the Rent of 6 l. 13 s. 4 d. by the year issuing out of all his Lands to Christopher Molineux for his life, with clause of distress, which was signed and sealed by him; And that afterward John the Eldest Son payed it during his life, and had Issue Edward, and died; That Edward assured that Land to Bridget the Lessor for her life, and that afterwards the Rent of 6 l. 13 s. 4 d. mentioned to be granted to the said Christopher,

stropher was not paid at the Annunciation Anno 40 Eliz. by Edw.
 nor at any time after by the said Edw. nor by the Executors of
 Sir Edw. M. nor by any of them; And that Edw. the Son of
 John died; And Bridget entred and let to the Plaintiff, that
 Christopher entred for non-payment of the Rent, &c. And it, &c.
 And it was argued at the Barr, and after divers arguments,
 the Court resolved for the Plaintiff. First, they held, that this
 Will devising such Rents, which are mentioned in such Writ-
 ings under his hand and seal, is a good devise in Writing of the
 Rents themselves: For it refers to the Writing, whatsoever it
 is, as if it were specially limited in that Will, and it is a good
 devise unto them of the several Rent-charges; And therefore
 Tanfield resembled it to the Case, where a man deviseeth, that his
 Executors shall sell his Lands: when the Executors afterwards
 sell it, it is a good devise of the Land it self by that Will. And
 upon this reason in Fairfax's Case in the Court of Wards, it was
 resolved by the opinion of the Chief Justices and the Counsel of
 that Court; That where one makes a Deed of feoffment to di-
 vers uses, and makes no Livery, and after by his Will deviseeth
 that Land to such persons and in such manner as he appointed
 by his Deed of feoffment: It was a good devise of the Land:
 But they all held, that a Will cannot refer to words only,
 without writing, but it ought to be a Will in writing for
 all; And therefore there cannot be any averment to add any
 thing thereto by words *de hors*, nor to abridge it by a condition
 added thereto by words. Secondly, they held, that these being
 Rent-charges by the Will, and the condition being to pay them
 according to the intent of the writings: It wants a demand;
 For otherwise the estate would not be defeated (for it is payable
 in nature of a Rent, and not as a collateral Sum) And
 therefore it is demandable, as 14 Ed. 4. & 22 Hen. 6. Third-
 ly, all the Justices besides Popham held, that this condition ex-
 tended to the Heir of the Heir of the deviser, and so to every
 Heir; because it is nomen collectivum, And he is to be tied
 to the payment of the Rents during the lives of every of the
 Sons who by intendment might survive the eldest Son; And
 therefore by construction of the Will, it shall be intended to
 extend to every Heir for the payment, during their lives; But
 Popham doubted thereof, because the words are, That his
 Son and Heir should not have the medling; So it extends
 unto him only in words: And the intent shall not be stretched
 in a condition. Fourthly, It was resolved by all the Court,
 that although the said Sums were not Rents out of the
 Lands, nor payable by the Heir without demand (because
 he was privy to the condition) yet Christopher Molineux the
 younger Son had not any title, because there ought to be
 default in the Heir, and also in the Executors, before that
 the youngest Son could Enter; And there cannot be any de-

Co. 6. 17. b.

 1 Cr. 77.
 1 Rol. 459.
 1 Rol. 461.

2 Rol. 233.

Co. 8. 93. a.
1 Cr. 577.

Post. 476.

Ante 111:

Ante 64.
Co. 5. 51. b.

1 Cr. 492.

Ante 127.
1 Rol. 784.

fault in the Executors for non-payment, until notice be given unto them of the non-payment by the Heir, whereof they cannot by any intendment have conusance without exprels notice given, and that lies in the conusance of him who is to receive it : wherefore no notice being found to be given to the Executor, and that there was a default after, there is not any condition broken, so as the younger Brother might enter to take advantage : wherefore his Entry is not congeable. And it was thereupon resembled to the Cases, 8 Ed. 4. 1. where notice ought to be given of an Arbitrement, although the Obligee himself be the Arbitrator, and 19 Ed. 3. Warranty of Charters : That although one recovers in a Warrantia Chartæ pro loco & tempore, yet if he be afterwards impleaded in an Action wherein he may vouch, he ought to vouch ; and if he doth not, he ought to give notice. Vide Co. 5. 113. b. Mallories Case : That Bargainee of a Reversion shall not take advantage of a condition annexed to a Lease, for the payment of Rent, without notice given of the Grant, although the Reversion be in him ; And upon this point principally it was resolved for the Plaintiff. But an exception was taken, because the life of Bridget, who was Tenant for life, and the Lessor in this Action, was not found ; And then it doth not appear that the Plaintiff had Title : Sed non allocatur ; For it shall not be intended that she is dead, unless it had been found ; and in a special verdict all necessary circumstances shall be intended, unless it be found to the contrary. Secondly, it was moved, that an Ejectione firmæ lies not of a Piscary ; And it doth not appear in what Will the Piscary is, and damages are intirely given ; and as to that, the Court was doubtful : But to avoid question therein, the Plaintiff released his Damages totally, and his Action quoad the Piscary, and had his Judgment for the Residue. And like Judgment was given this Term in another Action concerning the same Title, where the same special Verdict was found, betwixt Fretchvile and Molineux ; But none of these exceptions were herein : Wherefore it was adjudged for the Plaintiff.

Parry *versus* Dale, Mich. 2 Jac. Rot.

(5)
Yelv. 95.
Hob. 119.
2 Rol. 146.

DEbt: Upon an Obligation de quingentis libris ; The Defendant demanded Oyer of the Obligation, which was entred in hæc verba ; Noverint, &c. nos William Dale, &c. teneri & firmiter obligari Thom. Palfry in quemquegentis libris solvend. &c. The Condition was, Whereas John Swinnerton had a Lease of the customs of Mines, whereof the Obligor had an Interest, &c. If the Plaintiff should have the moiety, that then, &c. The Defendant pleaded an assignment of the Lease in Bar ; but in such manner, that

that the Court held it to be insufficient; And the Plaintiff demurring thereupon, he prayed his Judgment: But it was moved for the Defendant; That the Plaintiff had declared upon a Bond, and the Bond whereupon he intended to declare being entered in hæc verba, appeared to be variant: For Quemquegentis is not sensible, nor is Quingentis, as is pretended: For it is not any word at all; And not like to 9 H. 6. 7. where an Obligation of Wiginti pro viginti libris is held to be good: For W. is but two single V, so it is good enough; And the Case betwixt Walter and Pigot, which Williams Justice enforced much to be all one with this case, was answered, that they be not alike: For there it is Septuaginta for Septingenta, which is all one; For Septua. is always taken for septem, and genta dat semper centum; so it is good in proper signification, and there the condition was for the payment of 500 l. whereby it appears to the Court, that the penalty was more: But here the condition is to do a collateral Act; so it doth not shew the exposition of the Bond: And M is always variant from N, and several letters, and cannot be expounded all as one, as 2 H. 4. 8. & 14 Assise, in a Writ of Assise, Videre Tenementum illud pro Tenementum, was good enough there; The reason was, because in the Writ, part of the Writ was good, and that which came after was but a mispision of the Clerk, which shall not make it vicious. But where the word is insensible, and hath not any other thing to expound it, it cannot be good: wherefore by all the Court, besides Williams, who much opposed it, It was resolved, that the Declaration was variant, and the obligation ill in substance; And therefore adjudged for the Defendant.

Post: 190. 203;
261. 290. 603.
607.
Co. 10. 133. a.
1 Cr. 417.

1 Cr. 896;
Hob. 116.
1 Cr. 418.

Hob. 119;
Yelv. 95.

2 Rol. 147.

Bagshawe *versus* Goward, Hill. 3 Jac. Rot. 1070.

Trespals; For that 14. Octob. 2 Jac. he took & abduxit a Gelding pretii 5 l. The Defendant justifies as the Kings Bailiff of the Mannor of Eastlangton within the Duchy of Lancaster: For that he had Wayles and Estrays there, and took that Gelding there coming in as an Estray, and kept and detained him as an Estray, until afterwards the Plaintiff retook and resealed him, Quæ est eadem captio & abductio, &c. The Plaintiff replies, That the Defendant seized him the 14. Octob. 2 Jac. and that the Defendant postea 16. Octob. 2 Jac. and before his resealer laboured the said Gelding, riding upon him and drawing with him, whereby he was much damaged, Et hoc, &c. And the Defendant hereupon demurred, because it was a departure from the Declaration; For in that he brought his Action for the taking away of his Gelding pretii 5 l. That imports he never had him again: And where he hath his Gelding again, the rule in the Register is, that he shall not say pretii. Vide Regist. fol. 97. Sed non allocatur: For where he counts in trespass pretii,

(6)
1 Rol. 673.
879.
2 Rol. 362.
Yelv. 96.

Ante 130.
Post. 307.

Co. 8. 146. b.
Co. 9. 11. a.

Post. 379.

Yelv. 96.
1 Rol. 5.
2 Rol. 562.

1 Rol. 673.
1 Rol. 879.
36. 708.

pretii, &c. It is no plea, that he had his goods again : For that is only to be given in evidence in mitigation of Damages ; And although he saith, pretii, or doth not say it, is not matter of substance, or material. Vide 7 H. 4. 15. 11 H. 4. 2. 5 H. 6. 7. Secondly, it was alledged, that this is a departure ; For now it appears, that the first seizure was lawful, and he brings the Action for the abuse, which is matter subsequent at another day : So he ought to have brought the Action for the Tort if he did any ; for the offence the last day, and not for the taking, &c. Therefore the replication doth not maintain the Declaration for the trespasses alledged the first day. Also the using of the Estray by way of riding or drawing in a Cart, being proper services for him, is no cause of Action : Because he who hath property may use it, so as he doth not misuse it ; And he who hath an Estray may for that cause use him ; but then he must not demand any thing for the meat of such an Estray. But a distress may not be used, because he hath it by Law only as a gage : And this case is not like to the abusing of a distress, or the exceeding of an authority in Law ; for there trespass lies ab initio, as 21 H. 7. 22. 33 H. 6. 26. 11 H. 4. 75. 5 H. 7. 10. 10 Ed. 4. 2. But he who abuseth an Authority in fact is not punishable in trespasses but by Action upon the Case, for exceeding the Authority given him, as 2 Ed. 4. 4. 12 Ed. 4. 8. 18 Ed. 4. 27. 21 Ed. 4. 75. And the abuse of the Estray (he having a property) is the cause of the Action upon the Case : So this Action Vi & armis lies not. But all the Court (Popham absente) held, that there is not any difference betwixt this case and the case of a Distress ; For he hath it by Authority in Law, wherefore he is punishable for the abuse by Trespasses as a Trespasser ab initio. Also they all held, that this using of the Estray was an abuser thereof ; For it is not lawful for any to use it in any manner, unless in case of necessity, and for the benefit of the owner, as to milk Milch-kine, because otherwise they would be spoiled ; and so of the like : But to use a stray Horse by riding or drawing is tortious, although it were alledged, that the common course is, to use stray Horses with wythes about their necks ; But the Court held it to be an abuse. Wherefore they adjudged it for the Plaintiff.

Fawcets Case.

(7)
Yelv. 99.

FAWCET was Endicted upon the Statute of 8 H. 6. for forcibly entering into the Rectory of Horncastle, and thereof disseising the Bishop of Carlisle ; And the forceable entry was before the time of the last pardon ; And he tendered a Travers to the Enditement ; And after a Ven. fac. awarded and returned, and a Distringas with a Nisi prius ; The pardon came, which discharged the Fine for the King : Whereupon it was moved, that the

the Trial ought to be stayed; for there ought not to be any further proceedings thereupon: For it being the Kings suit, is discharged by his general pardon. But it was shewn to the Court, That the party Endicted was outed from his possession by colour of this Endictment, it being false; The Writ of Restitution being awarded upon it: Wherefore he prayed that he might proceed, and he would relinquish any benefit of the pardon: For he had not any other means to be restored to his possession; and it was not reason, that the general pardon should prejudice. And of that opinion were Fenner and Tanfield, It appearing here upon Record, that his possession was taken away by a Writ of Restitution upon this Endictment, it is reason he should proceed upon the Issue joyned before the Pardon to be restored to his possession, for which otherwise he had not any remedy: But Williams and Yelverton (absente Popham) held, that there ought not to be any proceedings upon this Endictment, the offence being pardoned by the General Pardon, whereof they are to take notice; and the party cannot proceed to have restitution; when, if it should pass against him, the King should not have the benefit of any Fine. And Williams said, it was so resolved in this Court upon conference with all the Judges of England, by express command from the Queen, in a case betwixt the Lord Stafford and Sir Thom. Thynn; And it was commanded to make search for that president; but there could not any such be found: Afterwards being moved again, Yelverton said, They had conferred with all the Judges in Serjeants Inn in Fleet-street; who held, with the offence being pardoned, there ought not to be any proceeding to have restitution. Wherefore by the Rule of the Court, it was ordered to be stayed.

1 Cr. 32.⁴⁴⁶
1 Cr. 47.
Yelv. 49.

Gennings *versus* Markham.

DEbt upon an Obligation; The Condition was to perform an Arbitrement; The Defendant pleaded Nullum fecerunt Arbitrium, The Plaintiff shews the Arbitrement, viz. That they awarded, The Defendant should pay super vicessimum primum diem Maij tunc proxime sequentem 20 l. to the Plaintiff: And that the Plaintiff super prædictum primum diem Maij should release to the Defendant all his right in such Copyhold, immediately upon the said payment; And alledgeth the breach; Quod licet he was ready to make the release, that the other had not payed the 20 l. according to the said Arbitrement: And it was thereupon demurred; For it was moved, That in regard the Release was to be made upon the foresaid first day of May, and there was not any such day (so it is insensible) the Arbitrement thereupon is void, it being the consideration of the payment; The payment need not to be made, but is void in all: And of that opinion was the whole Court: For the recompence in the Arbitrement

(8)
1 Rol. 254.
Yelv. 97.

Post. 153.

trement ought to be equal and reciprocal ; And if it be void on the one part, it is void for all : Wherefore, &c. Sed Adjournatur.

Commyn *versus* Kineto.

(9)

Ante 21.

Post. 161.

Error of a Judgment in Durham, in an Ejectione firmæ of a Colemine in the Parish of Chestin in the Street : The Defendant pleaded Not guilty, and found against him, and Judgment for the Plaintiff. The first Error assigned was, That an Ejectione firmæ lies not of a Colemine, because it is Quoddam proficuum subtus solum, and an Habere fac. possessionem cannot be thereof ; Sed non allocatur : For it is a profit well known, and whereof the Law takes bon consance, and therefore an Ejectione firmæ well lies thereof. And Tanfield said, it was adjudged in this Court in the Case of Dr. Wyld, that an Ejectione firmæ lies of a Boyllary of salt ; And it was cited to be likewise here adjudged betwixt Law-son and Williams, that this Action well lies for a Colemine.

(10)

1 Cr. 571.

1 Cr. 571.

Post. 493.

1 Rol. 463.

1 Cr. 20.

Normanville *versus* Pope, Cujus principium ante fol. 138. was now moved again in Arrest of Judgment ; And an Exception taken, which was not taken before, viz. Because it is not alledged to what Parish in London he returned ; but to London generally, which is not good ; but it ought to have been to a Parish, from which a Venue might have been : And for this cause all the Court held the Declaration to be ill. To the second exception, that notice of the time of his return was not alledged to be given, and therefore the monies are not payable ; Tanfield held, as this case is, there needed not any notice ; Because the Act is to be done by a stranger, and his time of return lies as well in the notice of the Obligor as of the Obligee ; wherefore the Obligor is at his peril to take notice thereof : But the other Justices doubted thereof. To the third exception, that the Venue ought to have been from London, so from the body of the County, and not from the Parish of Bow, They all held the Trial for this cause to be ill. Wherefore (Popham absente) it was adjudged for the Defendant.

Edwards *versus* Ousley.

(11)

1 Cr. 324.

Post. 399.

Post. 639.

Moort 906.

Post. 306.

Action for these words, Thou art a witch, and I will prove thee a witch : It was moved in arrest of Judgment, that the Action lay not, because it is a thing secret in the mind, and cannot be discovered : But all the Court held, that the Action well lay, especially the words being spoken since the Statute, which makes every Witchcraft felony : Wherefore it was adjudged for the Plaintiff.

Ford's Case.

Endicment was preferred against him, upon the Statute of 8 H. 6. That he entred with force, and disseised Harlakender, and held him out with force : The Bill was found Quoad the detainment with force, and thereupon restitution awarded. And now the Endicment being removed, and all this matter appearing ; It was moved, that this Endicment was ill ; Because it is not found, that he entred peaceably, as it ought, according to the words of the Statute. And of that opinion was all the Court. It was then prayed to have reresstitution : but it was moved, that it should be stayed ; Because it is only matter in the discretion of the Court : And it appears, that the intent of the Jury was not to find a Disseisin ; And if reresstitution should be had, the Earl of Oxford who is in Ward to the King, is to have the benefit thereof ; And then Harlakender who had been 30 years in possession should be infinitely delayed and kept out of possession : But yet being but to make reresstitution after an ill Restitution, Popham, Williams and Tanfield held it to be reasonable, and awarded it, against the opinion of Fenner and Yelverton.

(12)
Yelv. 99.Yelv. 99.
Ante 19.

The Lord Darcy *versus* Page, Trin. 4 Jac. Rot. 1965.

Valore Maritagii : The Defendant tendered a Travers upon the tender of Marriage alledged in the Count ; And it was thereupon demurred ; and after argument at the Bar, adjudged, that the tender was not Traversable in this Action : For Maritagium de mero jure pertinet Domino : And if the tender should be of necessity, the Lord might be defeated of the Marriage ; As if one takes an Infant, and go with him beyond the Seas ; or if he *Essoigne* himself to places unknown, &c. And in valore Maritagii upon the death of the Heir, the Executor shall not be charged. But Warberton said, that for an Heir female, because the Lord hath two years after her age of 14 to make tender of Marriage, the tender is Traversable. Wherefore it was adjudged for the Plaintiff.

(13)
Co. 6. 70. b.
1 Cr. 503.
Ante 66.
Co. 5. 127. a.
Co. 6. 70. b.

Co. 6. 71. a.

Anonymus Pasch. 4 Jac. Rot. 513.

Dower The Tenant pleads Release of the Demandant made to such a Tenant in possessione tenementorum prædictorum existent. And because he doth not say, that he was Tenens liberi tenementi, it was held to be no plea, and adjudged for the Demandant.

(14)
Co. Lit. 266. a.

Stead *versus* Moon, Mich. 2 Jac. Rot. 140.

(15) **D**Ebt upon a Bill obligatory; The Defendant pleaded Non est factum: The Jury found a special Verdict, finding the Bill in hæc verba: whereby appears, that the Defendant and one John Smith, sealed and delivered that Bond, and were joyntly obliged; and the said John Smith is yet alive. And if, &c. And it was adjudged without argument for the Plaintiff.

Co. Lit. 283. a.
Co. 5. 119. a.

Smith *versus* Gatewood, Trin. 3 Jac. Rot. 191.

(16)
Co. 6. 59. b.

1 Cr. 419.
Post. 446. 665.
Co. 6. 60. b.

Co. 6. 60. a.

Co. 6. 60. a.

TRESPASS, in a place called Horfington Holms: The Defendant Justifies; For that Stixwold is an ancient Vill, adjoining to the place where, &c. And that within the said Vill is, and time whereof, &c. hath been such a custom, That every Inhabitant within any ancient Messuage within the said Vill, by reason of his Commonage therein hath had common in the place where, for all his great beasts, at all times of the year, &c. And so Justifies as an Inhabitant: And it was thereupon demurred whether such a prescription and usage in a Vill for the Inhabitants, for Common and matter of profit be good; And after argument at Bar and Bench, It was resolved, that it was not good: For Inhabitants, unless they be incorporated, cannot prescribe to have profit in anothers soil, but only in matters of easement, as in a way or causeway to Church, or such like; so in matters of discharge, as to be discharged of Toll, or of Tythes, or in modo Decimandi, or the like: But to have Interest, it cannot be; For that ought to be by persons inabled who are always to have continuance: For if there should be such prescription, Then if any of the Inhabitants depart from their ancient houses, and the house continues empty; the Inheritance of the Common should be suspended, which cannot be. Nor can such a Common be released; For if one Inhabitant should release, another which succeeded him might claim it, which is against the Rules of Law, that an Inheritance in a profit should not be discharged; and by such prescription a Maid-servant or Child who resides in the house is said to be an Inhabitant, and to have the benefit of the Common; which would be inconvenient: wherefore they all resolved, That such a Custom alledged, by way of usage (not otherwise) is not good; and adjudged it for the Plaintiff: And it was said to be so resolved, Trin. 33 Eliz. Rot. 422. betwixt Lawrence and Hull. And Coke cited, that 19 H. 8. in Spelmans Reports, It was adjudged accordingly in this Court. Vide 7 Ed. 4. 26. 15 Ed. 4. 29. 18 Ed. 4. 3. 20 Ed. 4. 10. 9 H. 6. 62. 18 H. 8. 1.

Termino Paschæ,

Anno quinto JACOBI Regis in Banco Regis.

Hennings *versus* Paucharden.

Ejectione firmæ : of a Lease of Talbot of a Messuage in Saint Clements Parish. It was found by special Verdict ; That Talbot 10. Junij 44 Eliz. by Indenture demised to Pauchard the said Messuage Habend. a die Indenturæ prædictæ for his life, with Letter of Attorney to make Libery ; And that the Attorney made Libery 23. July, &c. And whether this Libery made after the day of the date, was good or not, was the Question. Popham, Fenner and Williams, held it to be void; because it was made by Attorney who had not any such warrant; And Popham said, if the Deed had been delivered after the day of the date, and then Libery had been made by Attorney, it had been well enough, and so it hath been adjudged : But they held, forasmuch as the Jury found that he demised 10. Junij 44 Eliz. by Indenture of the same date ; It is a Demise at that time ; and when they afterwards find, that Libery was made 23. July, That is repugnant and void. The Record also was, that the Libery was made 23. Julij ejusdem mensis Julij, which is also void : there being no month of July mentioned before. Therefore it was adjudged for the Plaintiff : For the Defendant claimed under that Lease.

(1)
1 Rol. 828. 9. It is proper to say that the day after the date, 440 words, 149.

Co. 5. 94. b.
1 Cr. 94. 388.
Post. 458. 569.
2 Rol. 828. 9.

Ante 149.

Benson *versus* Morley, Mich. 4 Jac. Rot.

Action for these words ; Thou hast robbed the Church (innuendo the Church of Saint Alphage) And thou hast stolen the Lead off from the Church (innuendo the Church of Saint Alphage aforesaid) The Defendant pleaded Not guilty : And after

(2)
1 Cr. 418.

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ter

ter Verdict for the Plaintiff; It was moved, that the words were not actionable: For they do not import of themselves what Church he robbed, nor that he robbed any material Church. For the robbing of the Church is oftentimes spoken of such who detain Church duties, or the like; and it shall not be helped in the substance by the innuendo. The pulling of Lead also from a Church, which is fixed to the Freehold, it is not any Felony in it self: wherefore the Action lies not. And of that opinion were Fenner and Williams: But Popham, Yelverton and Tanfield è contra; For the words are to be taken according to the common parlance, and to be spoken in the worst sense according to common understanding; and therefore when one saith, Thou hast robbed a Church, that is, in a felonious manner; and the innuendo shews to the Court what Church he intended; and the addition, And thou hast pulled off the Lead, is a further addition. And not a shewing wherein the Felony consisted, which he intended: And therefore Tanfield said, there was a difference where he said, For thou hast, and, And thou hast, &c. wherefore it was adjudged for the Plaintiff.

1 Cr. 418.
Ante 107.

Ante 114.
Aubr. 66.

Showel *versus* Haman, Pasch. 4 Jac. Rot.

(3)
Post. 247.
1 Cr. 268.
3 Cr. 234.
Moor 401.

Action for these words; Thou hast been in the Goal for stealing of a Pan; It was held, that the Action well lay, although he doth not charge him with any Felony.

Brigate *versus* Short.

(4)

Ejectione firmæ: Of a Lease 21. Octob. 4 Jac. Et quod postea scilicet eodem 21. die Octob. ann. 3. supradicto, he ejected him: After Verdict for the Plaintiff, It was moved in Arrest of Judgment, That this Ejectment being alledged to be a year before the Lease, is void and ill, and no Judgment ought to be given; and of that opinion was Tanfield: For there is not any such year mentioned of de Anno 3 Jacobi; and then there is not any year when the Ejectment was. But Fenner, Williams and Yelverton è contra, because the words be, Postea, scilicet eodem 21. die Octob. And therefore there needed not any year to be mentioned: And the addition of a year which was not mentioned before, and which is repugnant to that day which was mentioned, is idle and shall be taken for Null; Et postea the same day shall be good enough. Therefore it was adjudged for the Plaintiff.

Ante 96.

Leicester Forest.

Note: This Term all the Justices and Barons met at Serjeants. (5)
 Inn to confer of matters concerning the Forest of *Leicester*,
 by the Kings command; The Forest being the Kings in right of his
 Dutchy of *Lancaster*: upon these Questions. First, whether the
 Owners of Woods in a Forest or Chase, in the hands of a Subject,
 may fell them at their pleasure without Licence, and keep them
 incoppiced as long as they please. Secondly, whether the Owners of
 Land within such a Forest, might Erect Lodges for Warrens, or
 make Conyberries, or keep Sheep there. Thirdly, whether they
 who affirm that they have Parks within such a Forest, by Charter or
 Prescription, which have lain open for forty years or more, may now
 enclose them, and keep them enclosed as Parks. Fourthly, whether
 Deer coming out of the Forest into such enclosed grounds, may
 be killed by the Owners of such grounds. And upon these Questions,
 the Counsel of both parties being there; First, they all held,
 That a Forest may well be in the hands of a Subject, and shall be
 used as a Forest, if the King gives Authority by Express words for
 the Administration of Justice there, and for his Justices to come
 there: And if such Grantee might have Commission in such Cases,
 to use and have Officers of a Forest; Then it shall continue a Forest
 in the hands of a Subject: Otherwise without such liberties, it is but
 a Chase being in the hands of a common person. And *Popham* said,
 That he had seen such liberties of a Forest granted in that manner.
 Secondly, they all held, That in such Forests or Chases (being in
 the hands of a common person) Those who are Owners of Woods
 may cut them down at their pleasure, without Licence or View of
 the Forresters: But yet in such manner as they ought always to
 leave sufficient Vert for the Deer there. Thirdly, they all held,
 that they may prescribe to have Warrens or to keep sheep in Forests,
 although they were in the Kings hands. But without a special pre-
 scription it cannot be: And in such case of prescription for Warren,
 although it had not been used for divers years, if he had it by grant,
 or can prove it by prescription, a *Non user* is no cause of forfeiture
 thereof. But Sir *Edw. Coke* said, it had been adjudged, That the
Non user of a Fair or Market, or Courts, or such like liberties where-
 in the Subjects have Interest for their common profit or common
 Justice, is cause of seizure of them: But the *Non user* of Parks or
 Warrens, or such like, which are to the profit only, or pleasure of
 the Owner, is not any cause of their loss or forfeiture. And he said,
 it was adjudged about 18 *Eliz.* in the Case of the Lord *Hatton* in the
 Kings Bench upon Demurrer; That one might well prescribe to cut
 down his Woods in a Forest, being in the Kings hands. Which
Popham affirmed; but said, it was adjudged otherwise about the same
 time in the Exchequer. Also they held, That if one hath a Warren
 by Charter in all his Mannor, He may erect a Lodge, or make
 Conyberries

Co.Lit. 233. d.

4 Inst. 298.

4 Inst. 298.

4 Inst. 298.

F.N.Br. 230. d.

4 Inst. 297.

4 Inst. 298.

1 Cr. 311.

Conyberries in any place of the Mannor at his pleasure. But if he claims it by Prescription, he ought to make the Conyberries in such places wherein they have been used, and not in others. Fourthly, they held, That Parks being laid open to Forests for forty years, may yet be enclosed again; And they may kill any Deer which come therein. Fifthly, that Enclosures cannot be in Forests or Chafes, unless with low Hedges which may not disturb the game. And although Enclosures have been continued for forty years together, if they were not before, that they may well be destroyed and laid open.

Sir Drue Druries Case in the Court of Wards.

(6)

Co. 6. 74. a.
Post. 389.

Co. 6. 74. a.

Co. 6. 74. a.

NOte : This Term in the Case of Sir *Drue Drurie* for the Wardship of Sir *Rob. Drurie*, It was resolved by the Chief Justices, and Chief Baron; where the King had a Ward and granted it over: And after the King made the Ward Knight during his non-age; That it was a discharge of the Wardship: But in such manner only as if he now came of full age. But it doth not discharge him of the value of his Marriage, or of the forfeiture of his Marriage, if he had before given cause of forfeiture thereof: For they be Interests vested: And as things vested shall not be divested: And presently by his Ancestors death he being within age, and in Ward, the value of the Marriage is thereby given to the King, and by him transferred over to the Grantee: And although the Ward be made Knight; That makes him *quasi* of full age as from that time, and to have all priviledges as one of full age: Wherefore until his marriage satisfied, the Grantee shall hold the Land. But at the Common Law, before the Statute of *Merton*, if the Heir in Ward had been made Knight, he presently might have entred upon his Land: And the Land could not be holden for the value of Marriage. But now the Lord at his full age shall hold the Land until his Marriage satisfied; and so he shall do although he be made Knight. And they held, that although the Heir in Ward were created a Duke or Baron, yet it will not make him to be out of Ward: For it is but a dignity to his Estate, but doth not enable his person to do the service of Knighthood: And it was also held by them, That if the Heir within age be made Knight, although he satisfy for the value of the Marriage; yet the Lord shall hold it until his full age of 21 years.

The Lord Buckhurst *versus* Sir John Lewson, in the Court of Wards.

IT was resolved by the two Chief Justices and Chief Baron : (7)
 Whereas Sir Walter Lewson made a Lease for 100 years for Co. 6. 75. b.
 the payment of his Debts and performance of his Will; And
 after conveyed the Inheritance to strangers, and died, his Heir
 within age, the Lands being holden by Knights-service in Capite;
 That the King should have the Wardship or Liberty, as the Case
 required, by reason of that particular estate so created: It being
 an Act executed for the payment of his Debts: And although the Co. Lit. 78. a. b.
 Heir hath nothing in this Case, yet the King shall not be prejudiced Co. 10. 83. a.
 of that which is due unto him. Secondly, they held, Whereas
 Sir Walter Lewson conveyed his Land to Mary Curson the wife of
 Mr. Edward Sackville, being the Daughter and Heir apparent of
 his Sister, which Sister is now Heir unto him: That this Con-
 veyance is not within the Statute of 32 or 34 Hen. 8. to entitle Co. 6. 75. b.
 the King to any part of the Land; because it is a meer collateral 77. a.
 Line: Also his Sister survived him, so the Daughter of his Sister
 was not his Heir; and such Conveyance is out of the Statute of
 Marlbridge. And they held, that if the Grandfather infeoffed the
 eldest Son of the Father, or made a Conveyance to his Grand- Co. Lit. 78. a.
 children, the father being dead, that it is within the Statute clear-
 ly, because it is in recta linea; and the father being dead, they are
 in loco parentis, and the same care and affection which was intend-
 ed to be to their father extends to his Children: But peradven-
 ture if in such Case, at the time of such conveyance made, the fa-
 ther were alive, and after died in the life of the Grandfather, it had
 been within the Equity of the said Statutes, because they be Heirs
 to the Grandfather; But if after such a conveyance made, the
 Grandfather dies, and the father survive, whether this conveyance Co. Lit. 78. a.
 be within the Statute of 34 H. 8. was doubted; And Drapers Co. 6. 77. a.
 Case in this Court was cited, for the Wardship of Boyer the Son
 of the Daughter of Draper, to whom Draper had conveyed his
 land, and died, and his Daughter and Heir (the Mother of Boyer)
 surviving him, it was resolved, that he should not be in ward.

James Piers *versus* William Gore.

Action for words, for calling him Thief: The Record of Nisi (8)
 prius was; Quod prædictus Willielmus dixit de præfato Jacobo
 hæc scandalosa verba sequentia; He (præfatum Willielmum innuen-
 do) where it should be Jacobum, is a Thief: The Jury found the
 Defendant guilty de interius specificatis. Now this fault being
 spied, and not before, it was moved in arrest of Judgment, That
 no Judgment can be given upon this Verdict: And of that opi-
 nion was Tanfield, because the Verdict is given according to that
 Record;

Record; and if there should be any amendment, it would alter the Verdict, which ought not to be in any Case: And although the Roll in Court and the Bill upon the File were shewn to be good, yet it could not be now amended after Verdict. But Popham, Yelverton and Williams (absente Fenner) held, that is very well amendable; For when it is said at the first, Quod dixit de eod. Jacobo hæc Anglicana verba, he (præfatum Willielmum innuendo) this innuendo Willielmum is void; And it is an apparent mispissio, &c. Wherefore it is well amendable, and rule was given accordingly; and the Plaintiff had Judgment.

1 Cr. 278.
Post: 231. 354.

Colvile *versus* Parker.

(9) Information upon the Statute of 27 Eliz. of Fraudulent Conveyances: Upon evidence to the Jury, Tanfield cited it to be adjudged in one Woodies Case: Where one after marriage voluntarily assigned a Lease of years, quasi in Joynture for his Feme, and took the profits, and afterwards sold it to one who had not any notice of this Conveyance; That it was within the Statute, although at first it was not made upon trust to be revoked, nor any clause of revocation therein; Because it was a voluntary Conveyance at first, and shall be intended fraudulent at the beginning: But if at the time of the marriage or afterwards, by reason of a portion given by his Wives friends in recompence thereof, and for a provision for the maintenance of his Feme; He had made an assignment of such a Lease to his Wives friends, and had afterwards taken the profits thereof; (as in reason he ought during his life) and then had sold that Term: Yet it had not been within the Statute.

Post. 455.

Harris *versus* Dixon.

(10)
Yelv. 72.
1 Rol. 51.

Action for these words; Thou hast procured one Smith to come 30 miles to commit perjury before my Lord of Winchester, and hast given him 10 l. for that purpose. After Verdict, it was moved in arrest of Judgment, that an Action lies not for these words: Because it is not alledged, that he committed perjury, nor that the Bishop of Winchester was such a person before whom perjury might be committed; nor that it was in any Court: Sed non allocatur; For it is a great imputation, and shall be intended in the worst part: Wherefore it was adjudged for the Plaintiff.

1 Rol. 51.
Ante 120.
Post. 436.

1 Cr. 337.
Ante 120.
Yelv. 72.

Blyth *versus* Topham.

(11)
1 Rol. 88.

Action upon the Case; For that he digged a pit in such a Common, by occasion whereof his Mare being straying there, fell into the said pit and perished: The Defendant pleaded

ed

ed Not guilty, and found for him : And now the Plaintiff, to save costs, moved in arrest of Judgment upon the Verdict, that the Declaration was not good ; For when the Mare was straying, and he shews not any right why his Mare should be in the said Common, the digging of the pit is lawful as against him : and although his Mare fell therein, he hath not any remedy ; For it is *damnum absque injuria* ; wherefore an Action lies not by him : And of that opinion was the whole Court : Wherefore it was adjudged upon the Declaration, that the Bill should abate ; and not upon the Verdict.

1 Cr. 545. 173.
Hob. 284.
1 Rol. 88.

Banning versus Fryer.

A Libel was sued in the Spiritual Court ; For that he spake these words, *Vel his similia*, &c. The Defendant was there condemned, and costs taxed to 18 l. and upon a *Significavit*, An *Excommunicato capiendo* issued ; and before it was returned, or he taken, a general pardon was published ; And afterwards he was taken by virtue of an *Excommunicato capiend.* and being thereupon brought to the Barr by an *Hab. corpus*, It was prayed that he might be discharged : For the pardon discharges the matter of contempt, and then the imprisonment thereupon is discharged. But it was resolved, that this taxation of costs, being for the Plaintiffs benefit, is not discharged by the pardon, and by consequence the Excommunication thereupon is not discharged, for that depends upon the Principal ; Wherefore he was remanded ; And in this case they held, although the Libel was, that he spake those words, *Vel his similia*, &c. which is not good at the Common Law, yet the Spiritual Court using that manner, the course of the Common Law shall not controul it, nor shall say that it is void : Wherefore, &c.

(12)

1 Cr. 199.

Doctor Atkins versus Gardener.

S Cir. fac. Upon a Judgment in Debt upon the Statute 14 H. 8. by Doctor Laughton President of the Colledge of Physicians in London, who died before Execution had ; and thereupon the Successor brought a *Scir. fac.* to have Execution ; It was thereupon demurred ; because the *Scire facias* ought to be brought by the Executor or Administrator of him who recovered, and not by the Successor. But upon hearing of the Record, without argument, the Court held, that the Successor might well maintain the Action, For the Suit is given to the Colledge by a private Statute : And the Suit is to be brought by the President for the time being ; And he having recovered in right of the Corporation, the Law shall transfer that duty to the Successor of him who recovered, and

(13)

1 Rol. 515.
Ante 121.

1 Rol. 515.
Co. 4. 65. d.

and not to his Executors ; The Action being brought, for that he practised Physick in London without Licence of the Colledge of Physicians, against the Statute of 14 Hen. 8. Wherefore it was adjudged for the Plaintiff.

Smith *versus* Malings.

- (14) **R** Eplevin: The Defendant avows for Rent of 20 l. reserved upon a Lease for years of 80 Acres of Land, made by one Hastings, and conveys the Reversion to himself: The Plaintiff shews, that 60 Acres of those 80 were evicted by elder title ; And therefore demanded Judgment, because the Defendant avows for the intire Rent : whereupon the Defendant demurred ; Because the Plaintiff ought to have shewed how much of Land in value was evicted, and what part remained : For the Rent is not apportionable according to the quantity, but to the value of the Land evicted. And of that opinion were Popham and Tanfield, That the Plaintiff on his part ought to shew the value of the Land evicted, and how the Rent ought to be apportioned, and what part remained, and to tender it : For what the value is, and how the apportionment should be, are both in his notice, and because he hath not done so, the plea is ill in all. And Popham said, if the Lessor take a surrender of part of the Land, there shall be apportionment, and there the Lessor in his Declaration in Debt, or in avowry for it, ought to shew the apportionment, and demand that which is due for the remainder ; For it lies as well in his notice as in the Lessee's : But of an eviction peradventure he may not have consufance, wherefore he who pleads it, ought to shew the value thereof, and the apportionment : But Williams held, that the Lessor ought in his Avowry or Declaration to shew the apportionment ; For he ought to take knowledge of the eviction, and of his own Title ; And he said, it was lately so adjudged in the Common Bench ; betwixt Moyle and Ewer ; Wherefore the other Justices did not speak thereto, but would advise. Et Adjournatur.

3 Cr. 771.

Sir Richard Champernow *versus* Sir William Godolphin, Mich. 4 Jac. Rot. 259.

- (15) **E** Rror: To reverse a Fine levied by Charles Earl of Devon, and brought the Writ, as Cousin and Heir of the Earl of Devon, and assigns the Errors, and brings a Scir. fac. ad audiend. Errores, and doth not shew in either of the said Writs, how he was Cousin to the said Earl ; And for this cause the Defendant pleaded in abatement of the writ : and it was thereupon demurred in Law : And after Argument by Doderidge for the Plaintiff,

Plaintiff, and by Sir Francis Bacon for the Defendant: The Court resolved, that it was good enough, without shewing how in the Writ of Error, or in the Scir. fac. For the one is but a Commission to hear the Errors, and needs not such certainty; The other is but a Writ founded thereupon: And therefore How Cousin needs not to be shewed in the Writ; Nor is it requisite, that the title be shewed therein unless it be in a special Case, varying from the Common course; As where an Especial Heir in Tail brings a Writ of Error, or he in the remainder, because he is to entitle himself, he ought to shew specially How Cousin, or how he hath the Remainder; but otherwise not. And although in some such Writs, it is shewn, How Cousin, as in Venners Case, and is good enough, yet it is not of necessity; And the omitting thereof is no cause of abating the Writ. Vide 33 H. 6. 54. 34 H. 6. 44. 38 H. 6. 17. & 39. 45 Ed. 3. 25. The Book of Entries 272. Wherefore it was adjudged accordingly; And afterwards the Defendant answered to the Errors assigned In nullo est Erratum.

Ante 86.

COmya versus Kyneto, cujus principium ante 150. Et quod (16)
 Intratur, Hill. 2 Jac. Rot. 537. Another Error was assigned, because the Ven. fac. was awarded in the time of Q. Eliz. and a Distringas thereupon, Et pro defectu Jurator. an Alias distringas was awarded in the time of the King, which is, Quod distringat Jurat. nuper summonit. in curia nostra; whereas it ought to have been in curia nuper Regis. And by vertue of this writ, a trial was had by the same Jurors, with a Decem tales awarded de circumstantibus (which Authority is given to the Justices by the Statute of 5 Eliz. Cap. 25.) And for this cause it was argued at the Bar, that this trial was Erroneous; For the Sheriff had not any Authority by this Writ to distrain any but those who were summoned in Curia Regis, and there are not any such; Wherefore the writ is ill, and the Trial thereupon Erroneous. And of that opinion was Williams, who relied upon the Case of Sir Francis Knowls and Beckinshaw, where a Ven. fac. being awarded in the Common Bench, and returned in the time of Q. Eliz. and an Hab. corpora, And an alias Habeas corpora, pro defectu jurator. was awarded in the time of the King who now is, which was, Quod Hab. corpora Jurator. nuper summonit. in cur. nostr. Et apponatur eis Decem tales: And Trial being had in Banco, and Judgment thereupon, It was for this cause reversed. And another president was cited at the Bar, of a Judgment given in the Exchequer Chamber betwixt Goodwin and others, concerning the School of Bury, where a Ven. fac. was awarded in the time of the Queen, and a Distringas with Nisi prius in the time of the King, reciting, Quod distringat Jurat. nuper summonit. in curia nostra; whereas in truth there had not been any summons in cur. of the King, but of the Queen only, and Trial thereupon, and Judgment

Ante 89.

ment in this Court, and for this cause Error assigned and reber-
 sed; so Williams held here, and that there was not any difference be-
 twixt the Cases. But Popham, Fenner, Yelverton, and Tanfield held,
 that this writ is well amendable, the trial good, and the Judgment
 not Erroneous: And there is great difference betwixt the said
 two Cases which had been adjudged, and this Case; And that the
 said Cases are good Law: For in the first, the Hab. corpora is of
 Jurors summoniti in curia nostra; Et quod ad illos apponat Decem
 Tales. So the Sheriff had not any authority apponere Decem
 Tales, but to the Jurors first summoned in cur. Regis, and there
 was not any such: So as what the Sheriff did was without any
 warrant, and the trial thereupon Erroneous: But it is not here
 commanded in the writ to apponere any Tales to the Jury first
 summoned, and so a great difference. The second Case is of a
 Distringas with a Nisi prius, which is a special Authority to the
 Justices, who being Justices by that special Commission, and not
 having authority to take any Jury, but such which was summoned
 before in cur. Regis; there being none such, the trial therefore by
 another Jury was erroneous. But in this case, the Justices of
 Durham are original Judges of the whole Record, and had the
 Record before them at the time of the trial: And the Roll being
 good, it is a sufficient warrant unto them for the trial: And
 the writ being variant, it might be amended there, and so may
 be well amended here. And although the trial is there by part
 of the Tales: yet that Tales was awarded and returned by com-
 mand of that Court, and view of the Roll, and not upon the
 writ: wherefore it is good enough. And there hath been divers
 presidents, that amendment shall be of such judicial writs after
 the trial, to make them accord with the Roll, when that is well
 made, as in this Case it is. And therefore Tanfield cited Short
 and Arundels Case, where a Ven. fac. bare Teste upon the Sunday;
 after trial it was amended. And Gonnell and Bradish's Case; where
 a Ven. fac. bare Teste out of the Term, and being assigned for Er-
 roz, was amended, and made to accord with the Roll, and the
 Judgment affirmed. And a third president he cited, but remem-
 bered not the names, where a Distringas was awarded long time
 after the trial, yet the Roll being good, it was amended: And so
 they all held here, that it was amendable, and so awarded; And
 the Judgment was affirmed.

1 Cr. 278.
 Post. 354.

Moor 684.
 2 Cr. 183.

3 Cr. 203.
 Ante 64.
 Moor 465.

Dame Morison *versus* Cade, Hill. 4 Jac. Rot. 1153.

(17)
 1 Rol. 64.
 Post. 407.

Action for words: Whereas she was a widow, and in
 Communication with the E. of Kent about her Marriage:
 That the Defendant said, Askot had reported, that he had had
 the use of her body (innuehdo, That he had carnal copulation with
 her) ubi revera he never made any such report. And shews, that
 the Earl of Kent and others, were Suitors unto her for Marri-
 age,

age, and by reason of that scandal desisted his suit. The Defendant pleaded Not guilty, and found against him to 200 l. damages: And it was moved in Arrest of Judgment, that the words were not Actionable; For the first words may have a good intentment: As a Physician may have the use of her body, &c. And the innuendo cannot alter the words: Sed non allocatur; For the words in themselves cannot have any reasonable construction, and they shall be taken according to the usual and common sense of them, which is very slanderous to a Lady of such reputation: Wherefore it was adjudged for the Plaintiff. And this Judgment was afterwards affirmed in a Writ of Error.

1 Rol. 35.

The Earl of Northumberland *versus* Byrt,
Mich. 4 Jac. Rot.

Action upon the Case; For slandering his Title: Whereas (18)
Henry Earl of Arundel was seised of the Mannor of Hazelbert Brian in Fee, and gave it to Henry Earl of Northumberland in Tail, which descended to the Plaintiff: And whereas the Defendant was a customary tenant for life of a Messuage, and certain land, parcel of the Mannor; And the Plaintiff was in communication with one Powton 1. Feb. 1 Jac. to make a Lease for years of that land unto him, to commence after the Defendants estate for life was determined: For which, the said Powton agreed to bargain, and there and then offered for it 500 l. That the Defendant knowing thereof, and intending to hinder that bargain, and to slander the Plaintiffs Title, spake these words upon the first of March, Anno primo Jac. The late Earl of Arundel Lord of the Mannor of Haz. did make a Lease of my Tenement in Haz. unto one Mr. Stoughton for 60 years, to begin after the expiration of my customary estate, &c. And the same is a good Lease: Ubi revera the said Earl of Arundel, did not make any such Lease. By reason of which words, neither the said Powton, nor any other would give him ten pounds for the said Lease. Wherefore, &c. The Defendant justifies; For that Henry Earl of Arundel, before the gift alledged to be made to the Plaintiff, made such a Lease to Stoughton for 60 years; And that Stoughton conveyed that Lease unto him: Wherefore he in maintenance of his Title spake these words; The Plaintiff replies *De son Tort demesne sans tiel cause*: And issue joyned, and found for the Plaintiff, to his damage of 100 l. And it was now moved in Arrest of Judgment; First, that the Plaintiff alledgeth his Communication of the bargain with P. to be 1. Feb. 1 Jac. and shews those words to be spoken 1. Martij primo Jac. and doth not shew the communication of the Bargain to be continuing 1. Martij primo Jac. otherwise there is not any cause of Action: Sed non allocatur; For it shall be intended continuing: For when it was alledged, that the Defendant knowing it, spake those words to the intent to hinder him of his
P 2 bargain,

Post. 222.

Co. 4. 18. a.

Post. 225.

bargain; And that by reason of those words the said P. would not proceed in that bargain, that the bargain continued until the speaking. Secondly, that the words in themselves, without an innuendo, be not certain, nor import any slander: For they are, The late Earl of *Arundel*, sometimes Lord of the Mannor, did make a Lease of my Tenement, &c. and he doth not say, that Hen. Earl of *Arundel* made the Lease, nor when he made it. And if any other Earl of *Arundel* made the Lease, or if he made it after the gift in Tail, it is not material: Sed non allocatur; For it shall be intended in the worst part, and according to his intent, which he spake, when he said and affirmed it to be a good Lease. Thirdly, that he justifying the words by reason of the Assignment of the Lease, and in maintenance of his own Title, an Action lies not. Sed non allocatur; For in his words he doth not shew, that he spake them for himself, and in maintenance of his own Title: For it is lawful for every one to speak in countenance and maintenance of the Title which he claims: But the words in themselves import, that he spake them to countenance the Title and Interest of a stranger, which is not lawful: And now, when he is sued to be punished for them, (they being false as is pretended) he cannot excuse himself by entitling himself, when the words at the first did not import as much. And he now cometh too late to justify himself. Fourthly, the Issue *de son Tort Demeasne* absque tali causa is not good: But he ought to traverse the Lease, being special matter pleaded: Sed non allocatur; For the Issue is apt enough to draw that in Question: Wherefore it was adjudged for the Plaintiff.

Termino Trinitatis,

Anno quinto J A C O B I Regis in Banco Regis.

Alington *versus* Yearkner, Pasch. 4 Jac. Rot.

DEbt, Upon a Conditional Obligation : Whereas he by Indenture bargained and sold such an Abbowson to the Plaintiff and his Heirs ; If he acquitted, discharged, and sufficiently saved harmless the Plaintiff from all Bargains, Incumbrances, Statutes, Charges, &c. That then, &c. The Defendant pleads that he saved harmless the Plaintiff, and the Abbowson from, &c. as in the Condition : And it was thereupon demurred, because he did not express how he discharged, &c. which ought to be particularly shewn : And of that opinion was all the Court. Wherefore without argument it was adjudged for the Plaintiff, 22 Ed. 4. 40. 18 Ed. 3. Bar. 237. (1)

Co. 2. 4. a.
Post. 340. 363.
503.

Tymperley *versus* Coleman.

SCir. fac. upon bail : The Defendant pleads, that the Principal was dead before that Scir. fac. brought ; And upon motion, the Court held, that that without more is not any Plea ; For if once upon a Capias, Non est inventus be returned, the Reconuance is forfeited, because there was default in the party : And although it be usual, if the Principal tender his body upon the first Scir. fac. to accept it, yet that is of grace, not of necessity ; Therefore the death at the time of the Scir. fac. brought is not material, if he were alive at the time of the Capias returned : Whereupon it was adjudged for the Plaintiff. (2)

1 Rol. 336.
450.

Ante 109.
Hob. 210.
Moor 776.
Ante 97.

Johnes *versus* Williams.

Action *sur trover* of Goods, and converting them. The Defendant pleads Sale in market, whereby he justifies the Conversion ; And it was held to be no plea, because it amounts but to the general Issue ; And ruled accordingly, That if he did not plead, a Nihil dicere should be entered. (3)

3 Cr. 485.
1 Cr. 157.
Post. 319.
1 Inst. 303. b.

Memorandum,

Memorandum, upon Wednesday the tenth of June, this Term Sir John Popham Chief Justice of the Kings Bench departed this life, being a most Reverend Judge, and a person of great Learning and Integrity.

Co. 6. 75. a.

Mantle *versus* Wollington.

(4)
1 Rol. 475.

Ante 83.

Ejectione firmæ, Of a Joynt Lease by two : Upon Not guilty, a special verdict was found, That the two Lessors were Tenants in Common ; And whether he might declare of a joynt Lease or not, was the Question. Fenner, Yelverton and Tanfield held, that the Declaration was ill ; For he ought to have declared upon severall Leases of their severall parts ; But Williams conceived it to be well enough. The matter in Law intended to be found, was ; A Copyholder commits wast ; the Lord afterwards accepts of the Rent, whether that should bar him to enter for the forfeiture. But no resolution was given therein.

Lo *versus* Sanders, Trin. 4 Jac. Rot. 354.

(5)

Ant. 66.
Post. 674.
Hob. 77.

Action for these words, Thou hast stoln my Wood : It was demurred in Law, whether the Action lay ; And adjudged (without argument) for the Plaintiff ; For it shall be taken in the worst part. And Wood is to be intended of that which is cut down, according to the ancient rule, Arbor dum crescit, Lignum dum crescere nescit.

The Bishop of Peterborough against Catesby, Pasch.
5 Jac. Rot. 48 1. B.R. & Trin. 4 Jac. Rot. 1928. C.B.

(6)
Ante 141.

Ante 141.

Error : Of a Judgment in Quare impedit, for the Church of Whessam ; The question upon demurrer was, whether the time to collate within six months shall be reckoned according to twenty eight days to the month, or according to half a year ; dividing the entire year into days : And it was adjudged in the Common Bench, That he could not collate until after the half year, according to the days, and not at the end of six months, accounting twenty eight days to the month ; For the Bishop had collated after the six months past, but within the half year, being sixteen days more then the six months ; And Error was assigned in this point in Law. And after argument by Doderidge the Kings Solicitor for the Bishop, and by Yelverton for the Defendant ; It was resolved by the Court according to the first Judgment, that the collation ought to be after the half year, and not before ; For they held, that Tempus semelre in the Statute of West. 2. Cap. 5. is intended half a year according to the days of the year, which contains in the whole 365 days, which

which being divided, the half year is 182 days, and that time the Patron hath to present, who is the person chiefly regarded in Law. But they all agreed, that a month shall be accounted 28 days to the month, in case of a Condition for rent, 38 H. 6. 7. in case of Inrolments, as 5 Eliz. Dy. 218. in case of a Lett held within a month after Pasch. & Mich. And generally in all cases where the Statute speaks of months: But where the Statute speaks of years, it is to be construed as before, (viz.) 182 days to the half, as it 17 Eliz. Dy. And Yelverton said, that he had seen in Justice Spelmans Reports, a case between Doctor White and the Bishop of Lincoln, where it was resolved accordingly in case of Quare impedit: And that Justice Walmley shewed unto him a precedent in the time of Ed. 1. (which was immediately after the Statute) where it was resolved, That tempus semestris should be taken for the half year, and not for six months only; wherefore the first Judgment was affirmed. And it was here further said to have been resolved, that the Metropolitan may not present after the avoidance of the Church until the year fully ended: And by the same reason, the Ordinary cannot Collate until after the half year be ended.

Co. Lit. 135. b.

Co. 6. 62. a.

Leeche's Case.

Error brought by Leech, to reverse an Outlawry upon the Statute of 5 Eliz. of Perjury: The first Error assigned was, for that he was indicted by the name of Nicholas Leech, de parochia de Algate, and doth not shew in what County Algate is. Secondly, for that a County Court was held 23. Feb. and the next County Court was held 23. March following, so as there were not 28 days between those two County Courts, as there ought to be by the Law, exclusive and not inclusive. And for the first cause it was reversed, although it was objected to be well enough, because Middlesex was in the margent, so the Parish should be intended to refer thereto; But because an Endicment shall not be taken by intendment, and because the County in the margent shall be referred to the place where the offence was committed, and not to the habitation of the party; And by the Statute of 8 H. 6. there ought to be the addition of the place and County where the party indicted inhabits: Therefore it was held to be ill, and reversed. For the second cause also it was held to be erroneous: But Tanfield said, that ought to be assigned as an Error in fact: For it might be Leap-year; And then it is good, and that matter Issueable.

(7)

Añte 69.

1 H. 5. c. 5.

Bould and others against Sir Henry Wynston,
Hill. 4 Jac. Rot. 396.

(8)
2 Rol. 784. b.
793.

Co. 2. 15. a. b.

3 Cr. 630.
2 Rol. 794.

3 Cr. 834.

2 Rol. 784. b.
Co. 7. 40. a.

Ejectione firmæ; Upon a special Verdict, the case was such: Sir Henry Wynston by Indenture covenanted in consideration of natural love and affection to *William Wynston* his eldest Son, to stand seised to the use of *William Wynston* for life, and after to the use of such a *Feme* as he afterward should marry, for life, Remainder to the first Son of the said *William Wynston* in Tail: Afterward the said *William Wynston* being unthrift, and in Gloucester Goal; Sir Henry Wynston to disturb the rising of the use to the *Feme* whom afterwards he should marry, let that Land to his younger Son for a 1000 years: Afterwards *William Wynston* took to wife the Taylors Daughter, and died without Issue. And whether this Lease were good against her, was the Question; Hutton Serjeant for the Defendant held, first, that no use at all did rise to the *Feme*, although no Lease had been made; For the Consideration being special, in consideration of affection to his Son to stand seised to the use of, &c. that being only for blood, and in that special manner, cannot extend to the *Feme*, whom he afterward should marry; For she is a stranger to that Consideration: But if it had been in consideration of such a Marriage, with a *Feme* in certain, it had been good; And in proof hereof, he relied upon *Mildmays Case* and upon *Wifemans Case*. Secondly, admitting the use would rise, yet, it being a future use, and an Estate in contingency, this Lease being made before the use arose, and the Estate vested, is good, and shall charge the future Estate. Therefore it hath been ruled in one *Bells Case*, where one made a Feoffment, or covenanted to stand seised to the use of himself for life, and after to his first Son, and before the birth of his first Son, made a Feoffment; that should destroy his Estate: So this Lease for years being made upon a consideration before the Estate did arise, (being but an Estate in possibility) it shall bar the arising of that Estate, or at least, shall be a good bar for that time against that Estate, which was but an Estate in possibility at the time of the Lease made: And so was the opinion conceived in the case of *Wood and Reynolds*: Wherefore, &c. But all the Court resolved for the Plaintiff. First, that this was a good use; For the Consideration extends to the *Feme* which should be, as if it had been in consideration of Marriage; For the love and affection of the Son, extends as well to the *Feme* of the Son (who is quasi part to the Son) as to the Son himself; For that by intendment is good cause of the Sons advancement, which is the reason, that at the Common-Law the Son might

might endow his *Feme* ex assensu patris, and a man may give Lands in Frankmarriage before the marriage; For his affection is the cause of the gift: Wherefore the use here is well limited. Secondly, that this Lease shall not bind the Estate of the *Feme*, because there was a good Estate by the first limitation, which if it be not destroyed, cannot be charged nor incumbered after it is raised, because it hath relation to the first Covenant, and none hath Interest to charge it: And this Lease shall not destroy it, but may well be construed to arise out of the reversion which Sir Henry Wynston hath, and may lawfully charge: Wherefore it was adjudged for the Plaintiff. Note, *Williams* cited Sir Peter Lees Case in the Court of Wards, to be resolved in this point.

3 Cr. 854:
2 Rol. 793:

Butler *versus* Duckmanton, Trin. 4 Jac. Rot. 237. Derby.

T Respals: The Case upon special Verdict was such; Humphrey Duckmanton devised that Land to John Duckmanton, his Bastard-Son, and to the Heirs of his body; Remainder to Richard Duckmanton his Cousin and Heir, and to his Heirs; and devised the Land to Elizabeth his Wife for fifteen years, if she lived so long: The said Humphrey died 4 Ed. 6. Afterward Elizabeth married with Richard the Heir of the Devisor, to whom the remainder is limited, and they two entered, and had possession, and continued in possession: John Duckmanton, the first Devisee, in 15 Eliz. released to Richard Duckmanton all his Right and Interest in the said Lands, and afterward notwithstanding this Release, entered and let to the Plaintiff; upon whom the Defendant entered, Et si, &c. And hereupon the sole Question was, whether Richard Duckmanton be in after this Estate determined, as Tenant by sufferance, and what possession he had; And whether a Release unto him, he being but Tenant by sufferance, be good to vest the Estate in him: And after argument at the Bar, it was resolved, that he was in possession but as Tenant by sufferance; For in respect of his Reversion he had no colour to enter, and he came to the possession by colour of a Lease made to the *Feme*, which was determined by effluxion of time before the Release made, so as he had not any title to hold the possession, but as Tenant by sufferance, which Title he had until Entry was made upon him. Secondly, that this release being made unto him, he being Tenant by sufferance, is not good to vest any estate, for want of privity between them, and a release unto him, as to him who had the reversion, is void; Because he had not any possession, and an Estate cannot be vested in him in reversion, by this means; For if Tenant for life releases to him in reversion, it is void by way of release; and it cannot be by way of Surrender, for want of apt words: A fortiore here, &c. Wherefore without further argument, it

(9)

Co. Lit. 270. b.

3 Cr. 212
Dier 251.

was adjudged for the Plaintiff. Vide Litt. 107. b. 7 Ed. 4. 27. 29 Hen. 6. Release 8. 17 Hen. 7. 42. Mich. 30. 31 Eliz. between Allen and Hill, upon a release to a Tenant by sufferance.

3 Cr. 238.

Clark *versus* Cogge, Pasch. 4 Jac. Rot. 331.

(10)
2 Rol. 60.

Post. 190.

Hob. 234.

2 Rol. 60.

T Respals: Upon Demurrer the Case was; The one sells Land, and afterwards the Vendor, by reason thereof claims a way over part of the Plaintiffs Land, there being no other convenient way adjoyning; and whether this were a lawful claim, was the question: And resolved without argument, that the way remained, and that he might well justify the using thereof, because it is a thing of necessity; for otherwise he could not have any profit of his Land; Et è converso, if a man hath four Closes lying together, and sells three of them, reserving the middle Close, and hath not any way thereto, but through one of those which he sold, although he reserved not any way, yet he shall have it, as reserved unto him by the Law; and there is not any extinguishment of a way, by having both Lands: Wherefore it was adjudged accordingly for the Defendant.

Hancock *versus* Field, and others, Executors of Crouche, Hill. 4 Jac. Rot. 577.

(11)
2 Rol. 407.

2 Rol. 407.
Co. 5. 71. a.
Post. 623.
Post. 222.
Post. 487.

Co. 5. 71. a.

2 Co. 5. 71. a.

Covenant: For that the Plaintiff by Indenture let to the Testator a house in Fleetstreet, for years; And the Lessee covenanted to repair it well from time to time during the Term; and at the end of the Term to leave the same well repaired to the Lessor; and assigns the breach, for that he did not leave it well repaired at the end of the Term. The Defendant pleads, that the Plaintiff within three days after the date of the Indenture, released to the Testator all Debts, Duties and Demands; And the truth was, that the Plaintiff had recovered six pounds Damages and Costs against the Testator, and made an acquittance upon receipt thereof, with a general Release of all Actions, Duties and Demands; which was pleaded in Barr, being entred in hæc verba: Whereupon it was demurred, and after argument at the Bar, all the Court resolved, that it was not any Barr; For being a Covenant future, and not in demand at the time of the release made, but to be performed at the end of the Lease, this release, although it be of all demands, (which is the most general word in Releases) yet there appearing not any intent to release it, cannot therefore be any Barr; But if he had released all Covenants in such an Indenture, that had been a Barr: And although a release of all demands is good to extinguish * warranty, though future, and to Barr demand of relief, as 40 Ed. 3. 22. is: Yet that is,

is, because in the one Case, the Land is bound by the warranty, and the relief is by the reason of the Seigniorie whereto it belongs, so it is a good Barr: So it shall extinguish a Rent reserved upon a Lease, although it be made before any Rent arrear, because it is due by the Contract, which was before the Release made; But this Covenant here is merely future, and is not broken, nor to be sued before the end of the Term; And a release of Actions is not any Barr thereto, as Long 5 Ed. 4. is; and by consequence, a release of demand is not any Barr: And Tanfield cited a Case of one B. in 23 Eliz. to be adjudged accordingly; And for that purpose, the Case between Hooe and Marshall, Mich. 39 & 40 Eliz. was vouched, where one became Bail, and before Judgment the Plaintiff releaseth to the Bail all Actions and demands, and afterward the Principal was condemned, and did not render his body; And in a Scir. fac. upon this Reconuissance, the release was pleaded, and adjudged to be no Barr; Because at the time of the release, there was not any Recognisance in any Sum, nor was there any duty due; So here, &c. And of that opinion was all the Court. An exception was taken to the Declaration, because the breach was assigned, in not delivering up the house well repaired at the end of the Term, and he doth not shew in what point it was not well repaired: Sed non allocatur; For the breach being according to the Covenant, is sufficient; But if the Defendant had pleaded, that at the end of the Term he delivered it up well repaired; Then if the Plaintiff will assign any breach, he ought particularly to shew in what point it was not repaired, so as the Defendant might give particular answer thereto; And Justice Williams said, It was so resolved in a case between Boyle and Saxye, That in a Declaration in Action of Covenant, it sufficeth to assign the breach as general as the Covenant is; Wherefore it was adjudged for the Plaintiff.

Post. 487.

3 Cr. 580;
Co. 5. 70. B;
Post. 401.Ante 124.
1 Cr. 176.
Post. 486.
Post. 304. 661;
Yelv. 17.Vaughan *versus* Justice Williams.

Error of a Judgment in a Scir. fac. against him as Bail for one Powel, was brought, returnable before the Justices and Barons in the Exchequer Chamber, upon the Statute of 27 Eliz. Cap. And because there was some doubt made of the allowance thereof, it was moved in Court to be allowed; And all the Court held, that it was not allowable; For it is not any of those Actions mentioned in the Statute, whereof a Writ of Error lies, nor is he any party, who may have a Writ of Error of the first Judgment: And Manne the Secondary, shewed to the Court a President, that a Writ of Error was brought of a Judgment in this Court, in a Writ of Rescous; And although it be an Action in nature of Trespass, yet because it was not an Action named in the Statute, it was resolved, that

(12)

Post. 186.
Post. 384.
Yelv. 157.
1 Cr. 142. 286;
300.
Hob. 72.
1 Cr. 481.

that it was not allowable ; Whereupon here this Writ of Error was denied to be allowed.

Evans *versus* Thomas.

(13)
1 Rol. 487.

ERror ; Of a Judgment in the Common Bench : Upon a special Verdict, the Case was such ; One George Howel being seised of Land in fee, Covenanted with Morgan Williams, to convey it by Fine, or other assurance to Morgan Williams and his Heirs, before the Feast of Pasch. next following, which should be to the use of him and his Heirs ; with a proviso, that if he payed to Morgan Williams 100 l. at the end of 13 years, that then he might reenter, and that all Assurances should be to the Conusor ; And Covenanted and granted for him and his Heirs, with the said Morgan Williams and his Heirs, that he and his Heirs should enjoy the said Land until the end of the said 13 years, and after for ever, if the said 100 l. was unpaid. And Morgan Williams Covenanted, that he would pay annually during the 13 years, two Capons ; and that during the 13 years he would not commit any waste ; The assurance was not made : Whether this Covenant amounted to a Lease for 13 years or no, was the question : And adjudged in the Common Bench, that it was not any Lease, but merely a Covenant : And the Error was assigned in this point of Law only : And now Yelverton for the Plaintiff pleaded, that it was a Lease ; For so the intent of the parties appears, that the assurance should be in nature of a Mortgage, and that if the assurance were not made, yet he should have a Term for 13 years ; For otherwise, the Covenant should be in vain, that he should not commit any waste. But all the Court held, that it was not a Lease ; For the intent of the parties was, to make assurance of the Inheritance by way of Mortgage, which is but a Covenant, that he should enjoy during the time of the Mortgage, and not to make a Lease ; For if a Fine had been levied, or a feoffment made, That had not been a Lease, And the Covenant that he and his Heirs should enjoy it until the end of 13 years, and *in perpetuum* if the 100 l. were not paid, shews the intent, that it should not be a Lease, but merely a Covenant for the quiet enjoying ; And the Covenant that he should not make any waste, doth not expound it otherwise, but was to the intent, that he being but a Mortgagee, should not commit any waste ; for which otherwise there was not any remedy. Tanfield said, that it had been adjudged in one Pleasance his Case, if one Covenants and grants with another, that he shall have and hold his Lands for so many years, it is a good and absolute Lease : But if he Covenants and grants, that he shall enjoy his lands for ten years, it is not a Lease, because it sounds only in Covenant : And 44 Ed.3. *Monstrans de faits*, 144. is, if one Covenants with another, that if he will marry his Daughter, he shall

1 Cr. 207.
Ante 92.
1 Rol. 847.
Pest. 660.

1 Rol. 848.

shall have such a flock of sheep, he marries his Daughter: the property of the sheep was presently in him, because it was but a personal thing; And the Covenant is a Grant: So here, this was a Covenant, and no lease: Wherefore the Judgment was affirmed. Vide 21 H. 7.

Rickman versus Garth.

TRESPAS: Upon a special Verdict the case was, That Joh. Bishop of Carlisle let a Portion of Tythes to John Rickman, Francis and Thomas his Sons, for their lives successive, rendering the ancient Rent; and afterward died: Henry Bishop of Carlisle the Successor, accepts the Rent for divers years, and afterwards makes a new lease of those Tythes for 21 years which Lessee took those Tythes; And the Plaintiff, being the first Lessee, brings trespass, Et si, &c. The first question was, whether this was a good lease within the Statute of 32 H. 8. & 1 Eliz. Secondly, if it were not a good lease, whether the acceptance of this Rent by the Successor, makes it good against him during his time: It was resolved as to the first, That it was a void lease; For no lease is good, unless the ancient Rent be reserved, and annually due and payable according to the reservation: But this Rent being reserved upon a lease of Tythes for life, there is not any remedy for it by distress or assize, so the Lessee is not compellable to pay it; And because it is not payable as the Law appoints, it is therefore void. Vide 5 Ed. 3. 30 Ass. 5. Rent reserved out of a lease of an Hundred, for life, is void, for that reason; And Tanfield said, that this point was first adjudged in 29 Eliz. between Monington and Trie. Secondly, it was resolved, that the lease being void, the acceptance should not make it good; For it is made absolute void by the Statute-Law against the Successor, but not against the Bishop himself; And it is not like to leases by the Common Law, made by a Bishop or a Parson for three lives; there it is not void, but only voidable, which by acceptance may be made good; But the Statute of primo Eliz. in this case takes away the course of the Common Law: Wherefore it was adjudged accordingly.

(14)
2 Rol. 446;

Ante 112.
2 Rol. 446.

1 Cr. 95.
Co. Lit. 45. b. Cont.

Dyer 46. a.
Co. 3. 65. a.

Ward versus Walthew, Hill. 3 Jac. Rot. 11611.

EJECTIONE FIRMAE: Of a Messuage, and 15 Acres of land, 4 prati 50 pastur. in Sutton Coesfield, of a Demise of Ed. Willoughby, for three years: Upon Not guilty pleaded, the Jury found a special Verdict; That John Bishop of Exon. was seised in Fee de infra scriptis Messuag. & tenementis hie postea mentionat. in Sutton Colefield in Comitatu Warwicz. de infra script. Messuag. vocat. Marlepit-hall, ac de 3 Clofes vocat. Barbiclose, &c. Continent. 2 acr. prati, & 13 pastur. quae sunt & tempore quo, &c. fuerunt

(15)
Yelv. 101. 7.
11 H. 7. c. 20.
1 Cr. 244.

1 Cr. 57.

erunt parcell. tenementi infra script. & sic seistus, tam pro bono servitio donec by Nicholas Turnor his domestique servant, as for divers other considerations him moving, the 3 Apr. 36 H.8. dedit tenement. illa to the said Nicholas Turnor: And one Syble Yardley his Cousin, by Charter of Feoffment, which is found in hæc verba. Omnibus, &c. Scitatis me præfatum Episcopum, tam pro bono & fideli servitio mihi per Nicholaum Turnor domesticum meum, per plures annos elapsos præstito; quam pro diversis aliis causis & considerationibus, movent. dedisse & confirmasse præfato Nicholao & Sibyllæ Yardley consanguineæ meæ, unum tenement. nuper in tenura Willi. Taylor, in parva Sutton, infra dominium de Sutton Colefield, cum omnibus terr. & tenement. eidem tenement. spectant. necnon unum cottag. nup. in tenur. Johannis Burling, cum omnibuscroftis terr. & tenement. eidem pertinent. Habendum & tenendum dict. tenement. & cottag. cum omnibus eorum pertinent, præfat. Nicho. & Sibyllæ & hæredibus de corporibus suis procreat. And it was found, that the said Messuage and Clofes were inter alia cognita by the name of a Tenement, and occupied under the Rent of 15 s. And that the said Nicholas Turnor was then servant to the Bishop; And the said Syble was his Cousin; and that a Parriage was then intended to be solemnized betwixt the said Nicholas Turnor and Syble, which was had accordingly; And they had Issue John Turnor and William Turnor: But afterward Nicholas Turnor died; Syble surviving took to husband Francis Clapham; They the 29 Eliz. infeoffed the said John Turnor: Afterwards Francis Clapham died; Syble reentred: And after John Turnor levied a fine of those tenements *Sur Consens de droit come ceo, &c.* to the Defendant; Syble afterward in 35 Eliz. infeoffed of those Tenements the said William Turnor her second Son, John Turnor entred, and in 37 Eliz. infeoffed the Defendant; and afterward one Richard Smith, Cousin and Heir of the said Bishop, entred, and in 38 Eliz. let to the Defendant for years; William Turnor entred upon him, and infeoffed Ed. Willoughby, Lessor to the Plaintiff, who entred, and let to the Plaintiff, upon whom the Defendant entred, Et si, &c. The first question was, whether this gift in this manner, be a gift within the Statute of 11 H. 7. For if it be a Joynture within that Statute, and as purchased by the Husband, then this Feoffment by Syble to her second Son is a forfeiture, whereof the eldest Son and his Consul may take advantage; And it was resolved, that it was not a Joynture within the Statute aforesaid, for it was not a gift by the Baron, nor by the Ancestor of the Baron: And the consideration of the service of the Baron, is not said to be such a purchase as the Law intends: For it is no consideration, which being recited in the Kings Patent, if it were false, would make it ill, as it hath been adjudged; And it is not so valuable, as that the Law would intend it to be the purchase of the Baron, but a voluntary gift of the Bishop: And although the Deed be, for divers a-

ther

1 Cr. 244.
Yelv. 101.
Co. Lit. 366. a.

ther Considerations, there being no other expressed nor named therein, that general clause shall not alter the case, as it is held in Mildmays Case, Co. 1. 176. a. Also the naming Syble his Cousin in the Dēd is not material, because it doth not appear to be any consideration of the Dēd, but is by way of addition to her name: Yet in regard it is found in factō that she was his Cousin, and that there was a Marriage intended between them at the time of the Gift, which afterwards took effect; It shall be intended to be as well the cause of the Gift, as the service of the Baron: Also, if it should be construed the purchase of the Baron, yet Tanfield said, That that could be but for the moiety at most; For they took by moieties, being Purchasers before the Coverture; so for the moiety, the Feme cannot be a Joyntress within the Statute; And so it was resolved, 13 Eliz. in the Court of Wards, one Edmunds case, where the Father gave Lands to his Son, and to a woman whom he intended to marry, in Tail; They Intermarry, and have Issue; the Baron dies, the Feme surviving, aliens; That it was a forfeiture but for the moiety: But Williams denied it to be Law, and said, that in such cases it was a forfeiture for the entire. Secondly, it was resolved, admitting it were a Joynture within the Statute of 11 H. 7. yet as this case is, neither the Heir, nor the Conuſee, shall take advantage of the forfeiture, by the alienation to the younger Son; For when the Heir is infeoffed by the second Baron and the Feme, and afterward the Baron die, and the Feme enters, she defeats that Estate; and when the Heir levied a Fine to the Defendant, that Fine gave no interest, but only by Estoppel; because the Heir had nothing at the time of the Fine, nor the Conuſee, yet the Heir hath given his right to the entail, and concluded himself that he cannot enter; and the Conuſee cannot enter, because he hath nothing but by Estoppel, and no reversion: And therefore there is difference between this case, and that of Sir George Brown; There the Heir in Tail had a reversion in Fee expectant, and by his fine gave that reversion to the Conuſee, so he had the reversion of the Estate of the Conuſee, and might well enter in respect of the prejudice; But he hath not so in this case. Thirdly, it was moved, whether by this Habendum the Lands appurtenant to the Messuage passed, or not; And they resolved, That it did by the name of Tenementum. Fourthly, it was moved, That this Verdict did not maintain the Declaration; For the Declaration is, of Land in Sutton Coesfield, and the Verdict finds the seisin of Lands in Sutton Colefield; and the Deed is of Lands in parva Sutton, infra Dominium de Sutton Colefield; So neither the Verdict nor Deed agree with the Declaration, for the Will where the Lands lie; Therefore no Judgment ought to be given: But all the Court resolved, that the Verdict finding seisin de infra script. Messuage, &c. That is quasi an express averment; and finding, that Sutton Coesfield, and Sutton Cole-

Yelv. 101.

Co. 3. 50. B

1 Cr. 57. &
308.

1 Cr. 458.

field,

field, & parva Sutton infra Dominium de Sutton Colefield, are all one, and that they be all in one Parish, and that Sutton Colefield is an Hamlet within the Parish of Sutton Coefield; and this being in a Verdict, when the Jury found, quod dedit tenementa infra-scripta by name in the Deed, shall be intended all one; and so it appears was the intent of the Jurors: Wherefore it was adjudged for the Plaintiff. Vide Crooks 3 part of his Reports, Termino Hill. 7 Caroli, pag. 244. Copland *versus* Wyat, where this Cause is cited. Et vide Plowd. in Throckmortons Case for the pleading in this point.

Gybson *versus* Searl.

(16)
Ante 84.
2 Rol. 495. 6.

16. C. 76. 6. a.

Ejectione firmæ: Of Lands in Tatteridge, by the Lessee of Richard Peacock, against the Lessee of Gage, upon a special Verdict the Case was; the Bishop of Ely 26 H. 8. let the Mannor of Tatteridge, whereof the Land is parcel, to one Goodrich, with an exception of Wards, Parriages, Reliefs, Leets, Courts and Advowsons, Habendum for 99 years, rendring 12 l. per ann. This Lease was confirmed by the Dean and Chapter 1 Eliz. Coxe Bishop of Ely reciting this Lease and Exception, by Indenture demises the same things excepted, to the same Lessee for 21 years, rendring 3 s. 4 d. per ann. And further grants unto him the Bailiwick of the same Mannor, and constitutes him Bailiff of the same Mannor for 21 years, and grants unto him all Fees and Profits appertaining to the said Office, which was confirmed by the Dean and Chapter: And after found, that this Original Lease of the Mannor, by divers mean Conveyances came to the Lessor of the Plaintiff; And that the Inheritance of the Mannor came to the Defendants Lessor, who entred, and let to the Defendant; And that the Plaintiffs Lessor entred, and made a Lease to the Plaintiff, upon whom the Defendant entred; Whereupon, &c. Et si, &c. The sole Question upon the Verdict was, whether this Grant of the Bailiwick to the Lessee of the Mannor, be a surrender or determination of the first Lease of the Mannor: And it was argued divers times at the Bar, and then at the Bench; And all the Court resolved unanimously, that it was not any surrender: For that ought to be the intent of the parties; And it appears, that there was not any intent of the parties; but that he should have a Lease of the things excepted: Whereupon it was doubted in Law, whether such an exception of Wards, Parriages, Reliefs and Courts were good in the case of a common person, as it is in case of the King: But the Court held clearly, that it is void in case of a Common person; yet to take away that doubt, this Lease was made with an intendment to his benefit, and not to his hindrance, as it should be, if it should be construed to be a surrender; And therefore the Law shall not make

make such a construction; and in this Case, this grant of the Bailiwick is distinct, and of another thing then that which was leased before; and therefore cannot be any surrender; and for that cause may well stand with the other: And therefore Tanfield said, if a man hath Black-acre, and divers other Lands in D. and lets Black-acre for 21 years, and the next day lets all his Lands in D. for ten years, It is not any surrender of Black-acre; But shall be construed as a Lease of all the other Lands besides it, which may well stand with the former Lease. So a Lessee takes a Grant of a Rent-charge out of the same Land for life, or a Lessee for life takes a grant of a Rent-charge for years; that is not any surrender; Because he might have the benefit of that Rent after the Estate in the Land be determined: But if Lessee for life takes a Grant of a Rent-charge for life, out of the same Land, That is a surrender, according to 21 H. 7. 6. for otherwise the Rent-charge cannot take any effect. Vide 48 Ed. 3. 32. Accord. And it hath been adjudged in the Common Bench, if Lessor makes a Feoffment, and Letters of Attorney to the Lessee to make Livery, it is not any surrender; For he did it but as a Servant: Wherefore, the Bailiwick being a collateral thing, an acceptance of the Grant thereof is not any surrender: Williams Justice accords, It cannot be a surrender; Because the Bailiwick is not any interest in the same thing, which was let before: For a Bailiff hath not any interest at all, but is a mere servant, and doth things for the profit of his Master, although he doth them voluntarily, as 2 Ed. 4. 4. is, yet it is intended to be done in the name of his Master; and in Debt hereupon, the Declaration shall be, that the Master let. And whereas the case of 3 Eliz. Dy. 200. hath been objected: Where the Lessee for years of a house accepts a grant of the custody of the same house, that it should be a surrender; This is true, and hath been so adjudged: For the custody of the same thing which was let before, is another interest in the same thing leased, and cannot stand with the first Lease; And therefore not like to this Case. And it hath been adjudged in Sir John Chamberlains Case; That where Lessee for years of Park, accepts a grant of the Office of Park-keeper of the same Park, for his life; That is not any surrender, because it is an Office collateral to the Land; But if a Lessee takes a grant of Common out of the same Land, or of the herbage of the same Land; That is a surrender, because it cannot consist with his Lease: And it is a common case, That in many Mannors, a Coppyholder is Bailiff of the same Mannor, by custom; and it was never taken to be any surrender: So if Lessee for years of a Mannor, be made Surveyor or Steward thereof for life, that is not any surrender, as it was resolved in the case of Sir Valentine Brown; And the Bailiff of Westminster is commonly a great man, who hath also Leases in Westminster of the Demise of the Dean and Chapter,

ter, and yet it was never intended to be any Surrender; and therefore not here: Wherefore, &c. Yelverton, it cannot be a surrender for these causes; First, for that the Lease of the Baillywick is of another thing. Secondly, a Bailiff hath authority to meddle with the Land, but hath not any interest therein. Thirdly, because a Bailiff hath no permanent Estate, but is determinable at the Lords pleasure: For the authority of a Bailiff, vide 21 H. 7. 12 H. 7. 14. 3 Ed. 2. Title Avowry; That a Bailiff may receive Rents, take Fealty, pay Quit-rents, repair Houses and Fences, but in such manner as before; For he cannot tye where it was thatched, nor impail where it was mounded with a hedge; And he may do any thing for his Masters benefit, but not to his prejudice without his assent; and therefore he cannot give seisin of Rent, nor exchange the Lords Land; as 41 Ed. 3. 26. is, and 29 H. 8. in Bro. A Bailiff may be Steward of the same Mannor, for they may well both stand together; and 20 H. 7. 5. Bailiff of a Mannor, who hath Rent issuing out of the same Mannor, shall have that Rent by *Recover*, which proves that it is not suspended, because the Baillywick being a thing distinct from the other, the taking of a grant thereof cannot be a surrender of the Lease of the Land: Wherefore, &c. Fenner accord in omnibus: Whereupon it was adjudged for the Plaintiff.

1 Cr. 138.

1 Cr. 138.

Shoyle *versus* Taylor, Mich. 4 Jac. Rot. 87.

(17)
Co. 8. 129. b.
130.

1 Cr. 499.
Co. 8. 129. b.

Hob. 183. 327.

Information in the Exchequer upon the Statute of 5 Eliz. cap. 4. by Shoyle for the King and himself; For that the Defendant at Saint Clements prope Temple Bar, London; The first of December 3 Jac. & continue postea usque 12. Novemb. 4 Jac. (which was until the day of the Information) for the space of eleven months and more, exercised and occupied the Art and Occupation of a Brewer; being an Occupation used within the Realm 12. Jan. 5 Eliz. ubi revera he did not exercise the said Trade, the 12. Jan. 5 Eliz. nor was ever brought up for seven years as an Apprentice in the said Art, Contra formam Statut. &c. The Defendant pleaded Not guilty, and found against him, and after Verdict, moved in arrest of Judgment; First, that the Art of a Brewer is not such a Trade, the using whereof is prohibited by the Statute, Sed non allocatur: For by the express words of the Statute, it is reckoned as a Trade or Occupation; And the words in the Statute whereupon this Information is founded, refers to the Trade aforesaid. Secondly, that by the Statute of 31 Eliz. cap. 5. it is enacted, that Offences against the Statute of 5 Eliz. shall be inquired of only in the Sessions of Peace, Assizes, or Leets, within the County where the offences are committed, Et non alibi extra Comitatu. so as this Information, upon this Statute in this Court, is not maintainable;

And

And of this point the Barons were in doubt: But it was afterward resolved upon consideration of the Statute, that the Information well lay; For the intent of the Statute was, that for such offences, men should not be drawn out of the County where the offence was committed; And although the Statute mentions, that the Suit shall be for them in such Courts there named, yet it is not in the Negative, (and not in any other Court) but not in any other County; And this being a Suit for the King, and in this Court proper for him; This Information is well maintainable, and so it was adjudged: And this was the first Case, wherein Sir Lawrence Tanfield (being before Justice of the Kings Bench, and the same day made Chief Baron of the Exchequer, being the last day of the Term) spake, and adjudged by the opinion of all the Court: And a Precedent was shewn, Pasch. 3 Jac. Rot. Ante 85; 150. in the Kings Bench, between Bean and Drage, for using the Art of Spurrier, within the said Parish of Saint Clements, against the said Statute; And it was adjudged, that it well lay; But it was said, that there was not any question in that Case, Because the offence being in Midd. and the Kings Bench sitting in Midd. they had the power of the Sessions intended within the Statute; But the Court held it to be all one: Wherefore it was adjudged accordingly. Note the Principal Case was afterward affirmed in a Writ of Error.

The King *versus* Twine, and others in the Exchequer.
Mich. 3 Jac. Rot. 150.

UPON Demurrer, the Case was such; One George York recovered against John Allen 4000 l. Damages, in an Action upon the Case: Afterwards George York being outlawed in a personal Action, died; Queen Eliz. 34 Regni sui, (reciting that he was outlawed, and dead) granted all his Goods, Chattels and Debts to Francis Anger, to the use of Mary York: Afterwards Francis Anger; by Deed assigned that Debt and Judgment to Christopher Twine; And notwithstanding an Extent issued in the Kings Name, to extend all the Lands which the said John Allen had at the time of the Judgment: And the Lands in the possession of Thomas Twine (which he purchased after the Judgment) were extended: And thereupon he, (as Tenant) pleaded against this Extent, to be discharged thereof; It being upon assignment made 34 Eliz. by the Queen: Whereas by the Assignment made by Anger to Twine, he is chargeable to him only, and not to the King: And it was thereupon demurred, and argued divers times in the Exchequer; And the principal question was, Whether after this Assignment of this Debt by Queen Eliz. The King may extend in his own name, for the benefit of the Patentee; And the Patentee thereby might

have the Suit in the Kings Name : And after the argument at the Barr, all the Barons resolved, that as the Kings grant of a thing in Action, is good enough; so this debt which is forfeited to the King by the Outlawry of York, is well granted, and the Grantee may have the benefit to levy this debt, by Action in his own name, or by extent in the Kings Name; although he hath not any words in his Grant, to sue it in the Name of the King, as is usual in such Cases: But the Assignment over of this debt by Francis Anger (the Kings Patentee) to Christopher Twine, is merely void; For there cannot by Law be any assignment made by any common person of his debt: Wherefore it was adjudged, that the Plea was ill, and no cause of discharge; and that the Land should remain in extent for the King. Vide 4 Hen.8. Dyer fol.1. & fol.30. Bretons Case, 39 Hen. 6. 26.

Crofs versus Faustenditch, Hill. 2 Jac. Rot.

(19)
2 Rol. 260.

Ejectione firme, Of a Lease from John Elms: Upon Not guilty pleaded, the Jury found a special Verdict, (viz.) that Edw. Elms, father of the Lessor, was seised in Fee; And in 35 Eliz. covenanted by Indenture, in consideration of love to his eldest Son, and for the settling his Lands in his name and blood, and according to the Estates, provisoes and limitations therein mentioned, that he would before Easter convey his Lands to Ed. Appley, and others, to the use of himself for life, the remainder to his said Son, the Lessor in Tail, with divers remainders over; The remainder to his right Heirs; And that all Estates made should be to the uses, and under the Provisoes afterward mentioned, with a Proviso, that he might make Leases for 21 years of any part thereof; And that the Coveyances should be to the use of the Lessee, with a Proviso, that he might revoke all the Uses and Estates, by any his Writing, or Will: he also covenanted that he would stand seised, from and after Easter of so much of the said Lands which should not be sufficiently conveyed, to the said several uses, intents and purposes: They found, that before Easter no Assurance was made according to the Indenture; And that in 40 Eliz. for 30 l. paid, he by Indenture demised to the Defendant for 21 years, And found the clause of the Statute of 27 Eliz. cap. 4. That if one makes a Conveyance, with clause of revocation; And afterwards for Consideration of money, or for other Considerations, Bargains, Sells, Demises or Grants the said Land to a stranger, that the said conveyance shall be void and revoked, &c. They further find that Edward Elms died, and that John Elms entred, and let to the Plaintiff, upon whom the Defendant reentred, Et si, &c. First, it was resolved without argument, that the Uses and Estates raised by this Covenant in this Indenture, being made in consideration of love to his Son, (no Estate at all being executed before Easter,) The Covenant extended

extended to all, (although it was objected, That the words being, That of so much of the said Lands as should not be sufficiently conveyed, he would stand, &c. The intent was, that he would stand seised, when part was conveyed, and sufficiently executed ;) But when no part was executed, it was not his intent that all should be raised by Covenant : Sed non allocatur ; For the consideration being sufficient, the Covenant well extends to all : there being nothing conveyed by the Estate executed. Secondly, it was resolved, That the Estate being not executed, (the uses rising by Covenant only) the Proviso to make leases is void ; For the Lessees are strangers to the consideration of blood, and therefore cannot take benefit of any such Estate thereby ; And the father hath not any authority to make leases. Vide *Mildmayes Case*, Co. 1. fol. 176. And the *Lord Pagets Case*, *ibid.* 154. Thirdly, (which was the principal question) when Edward Elms, (who was but Tenant for life by this Conveyance, with power of Revocation) made a lease for 21 years (which might have had his determination during his life,) it being made in consideration of money payed, whether that should be said to be a lease derived out of the Estate for life only, or whether the Lessee shall have benefit of the Statute of 27 Eliz. That this voluntary and revocable conveyance should be said to be void and revoked quoad the Lessee, was the doubt : And it was held by all the Justices, that this lease should be good and absolute, and not be impeached by the former ; But he who made it having power to revoke it, the Law shall construe it as revoked, and void quoad the Lessee, and that he was as tenant in fee, when he made that lease : For it is expressly within the words and intent of the Statute of 27 Eliz. This lease being made in consideration of a fine payed. And it was said at the Barr, that in 29 Eliz. between Hinde and Collins, it was resolved in this Court, that where one had made such a conveyance, and had made a lease reserving Rent, without other consideration, that it was sufficient, and a revocation of the first estate, quoad that lease : Wherefore, &c. And because none of the Plaintiffs part had argued, they gave further day. Et adjournatur.

Memorandum, The last day of this Term, Sir *Tho. Flemming* Chief Baron, was made Chief Justice of the Kings Bench, and immediately after he was sworn, Sir *Lawrence Tansfield* one of the Judges of the Kings Bench, was made Chief Baron, and sworn before the Lord Chancellor and Treasurer : And afterward the same day, the Lord Chancellor came back into the Kings Bench ; And Sir *John Croke*, one of the Kings Serjeants, was made Justice of the same Bench ; And that day also *Doderidge* the Kings Solicitor was made the Kings Serjeant, (he being Serjeant before, having by dispensation left his habit, and become Solicitor ;) And in his place Sir *Francis Bacon*, who

was

was of the Kings Counsel at large, without any special place was made the Kings Solicitor.

Civitas London *versus* Greyme, Trin. 5 Jac. Rot. 1607.

(21)
Moor 877.
2 Rol. 814.

The Case was; The Mayor and Citizens of London covenanted to find eight men to grind every day in Bridewell Mill, which they let to the Defendant, and agreed, That if they failed therein, the Defendant should retain so much of the Rent out of his Rent: The Defendant pulled down the Corn-Mill, and made it an Horse-Mill, and would not defalk so much out of his Rent, as he ought to be allowed for the eight men: But all the Court held, that by the alteration of that Mill in this manner, the Lessors are discharged of their Covenant; And that this conversion is waste, although it were for the Lessors advantage: And so it is to convert a Corn-Mill to a Fulling-Mill.

Co. 4. 87. a.

2 Rol. 814.

Wodell *versus* Hungate.

(22)
Ante 8.
Ante 35.
Post. 626.

Debt: Upon an Obligation against an Executor, who pleaded that the Testator, tempore mortis suæ was indebted to the King for the Office of Sheriffship; And because it was not averred that it was verum & justum debitum, & minime solutum, it was demurred in Law: And without argument, (because an Injunction was served out of the Exchequer) adjudged for the Plaintiff.

(22)

gained Lord T. 1610. The King's Counsel at large, without any special place was made the Kings Solicitor. The Case was; The Mayor and Citizens of London covenanted to find eight men to grind every day in Bridewell Mill, which they let to the Defendant, and agreed, That if they failed therein, the Defendant should retain so much of the Rent out of his Rent: The Defendant pulled down the Corn-Mill, and made it an Horse-Mill, and would not defalk so much out of his Rent, as he ought to be allowed for the eight men: But all the Court held, that by the alteration of that Mill in this manner, the Lessors are discharged of their Covenant; And that this conversion is waste, although it were for the Lessors advantage: And so it is to convert a Corn-Mill to a Fulling-Mill.

Termino

Termino Michaelis,

Anno quinto J A C O B I Regis in Banco Regis.

Selmani *versus* King and others.

Assumpsit: Whereas upon a Suit in the Star-Chamber, (1)
between the Defendant and others, a Commission issued
for the examination of Witnesses; And the Plaintiff at
the time of the Commission kept an Inn in Beningham:
In consideration, that he promised to find horse-meat and mans
meat for the Defendant and his Company, during the time of the
sitting of the Commission; That the Defendant assumed to pay
to the Plaintiff all such Sums as that diet and horse-meat amount-
ed unto, when he should be thereunto requested; And alledgeth in
facto, that the Commissioners sate there three days, and that he
found the said horse-meat and mans-meat during the said time,
which amounted to five pound six shillings; And that the Defen-
dant, licet sapius requisitus, hath not payed it: The Defendant
pleads Non assumpsit, and found against him; And now moved in
arrest of Judgment, that the promise being, to pay when he should
be requested, there ought to be precise request alledged, and the
year, day, and place of the request expressed; For the Defendant
is not otherwise chargeable in an Assumpsit; And of that opinion
was the whole Court: For when the Defendant is chargeable
upon a collateral promise, and not for a meer debt, there ought to
be a request precisely alledged: But in an Assumpsit for Debt,
where a duty was due before, that being but in nature of a debt,
the general allegation, licet sapius requisitus, is sufficient: And
for that cause the Judgment was stayed.

Post. 523.
Yelv. 66.

Ante 102. 229.
1 Cr. 35.
Post. 640.

Winckworth *versus* Mayo, Trin. 5 Jac. Rot.

TRespass for breaking his close: The Plaintiff in the Novel
assignment, expresseth the place to be, in an Acre of Land; (2)
And shews the Buttals and Siding, East, West, North and
South: The Defendant pleads Not guilty; The Jury found
quoad transgressionem in dimidio infra specificat. unius acr. ter. Ante 113.
that the Defendant is guilty; And assess Damages, &c. Et
quoad residuum that he is not guilty; And it was thereupon
moved, that the Plaintiff should not have Judgment: For the
place

Yelv. 114.

Hob. 119.
Post. 442.
Ante 85.

place assigned being abbuttall'd four ways, the moiety thereof cannot be bounded in such manner; so the Plaintiff hath failed in his abbuttals: And the Court at the first motion were of that opinion; But at another day being again moved, they all held it to be well enough: For although the Plaintiff by this Verdict may be intended to have but a moiety, being peradventure Tenant in Common with a stranger, yet upon a general Issue, the Defendant shall not take advantage thereof, but the Action well lies for the Plaintiff. Also although the place assigned is an Acre of Land, and the Jury found it to be an half Acre, it is well enough: Also although the trespass is made but in dimidio unius acr. yet that accords as the Plaintiff hath counted: And although the trespass was done in the moiety thereof, yet it may be well alledged to be done in the whole Acre: Wherefore the Plaintiff had Judgment.

Jerrat versus Caldewell, Pasch. 4 Jac. Rot. 517.

(3)

Moof. 422.
3 Cr. 489.

* Post. 493.
1 Cr. 46.
† Post. 190.
Telv. 46.

Error of a Judgment in Burton sup. Trent: The first Error assigned, ore tenus; Because it was not shewn in the style of the Court, by what authority it was holden, (viz.) by Charter or Prescription: The second Error, because the style of the Court is, Coram Seneschallo & Ballivo Domino Paget; and he doth not shew their names: And both these were held to be Errors incurable: For in these Inferior Courts, the * authority whereby they are held, as likewise the † names of the Judges before whom, ought always to be expressed; otherwise the Kings Courts cannot take Consuance of their authority: And for these causes it was reversed. Vide 22 Ed. 4. 8. 22 Ed. 4.

Sir Thomas Holt versus Astgrigg.

(4)

Post. 337.
3 Cr. 346.

Action upon the Case for words, *Sir Thomas Holt* struck his Cook on the head with a Cleaver, and cleaved his head, the one part lay on the one shoulder, and another part on the other: The Defendant pleaded Not guilty, and found against him; And now moved in Arrest of Judgment, That these words were not actionable; For it is not averred that the Cook was killed, but argumentative: And of that opinion was the Court, Fleming and Williams absentibus: For slander ought to be direcd, against which there may not be any intendment: But here notwithstanding such wounding, the party may yet be living, and it is then but trespass: Wherefore it was adjudged for the Defendant.

William Harrison, Executor of Thomas Harrison,
versus Fulltowe.

ERror of a Judgment in the Common Bench, in Debt upon (5)
 two Obligations; the one of 60 l. for the payment of 40 l. Yelv. 108.
 14. Octob. 42 Eliz. the other of 40 l. for the payment of 20 l. at
 another day: The Defendant pleaded payment of both; and
 found against him for them both: But the Verdict was entered,
 quod non solvit the said 40 l. super quartam diem Octob. where it
 ought to have been supra quartam decimam; And Judgment was
 given upon this Verdict, and a Writ of Error brought, and the
 Record removed: And now this fault being spied, it was moved,
 that it might be amended; For by the note of the Clerk of the
 Assises, This Verdict was for the Plaintiff: And although it were Post. 628.
 after the Writ of Error, The Record being here, it was awarded 1 Cr. 338.
 to be amended. Another Error assigned, was, That the Writ
 Original was against Thomas Harrison Executor of William Har-
 rison; And so was the Capias, the alias, and the pluries: But the
 Declaration, Verdict and Judgment were against William Harri-
 son Executor of Thomas Harrison; So it is variant from the De-
 claration, and doth not warrant it: And although it was moved,
 that this being after Verdict, is helped by the Statute of 18 Eliz.
 which provides that after Verdict, the want of an Original shall
 not prejudice; And here is not any Original against William Har-
 rison, against whom the Verdict and Judgment were given; And
 so is within the provision of the Statute: Sed non allocatur; For 3 Cr. 722.
 although the Statute helps when there is not any Original, yet Co. 537. b.
 when there is an Original which is ill, that is not aided; And here 1 Cr. 282.
 the Original is against Thomas Harrison, Executor of the said
 William Harrison the Testator, so the Original Writ is against
 the Executor, but there is a mistake in his Christian Name: And
 the same Record shews, that obtulit se versus Thomam Harrison;
 And the Capias is against Thomas Harrison, so is the alias, and plu-
 ries; And being all upon one and the same Record, it shall be in-
 tended, that the Declaration and proceedings are upon that writ
 which is vicious, especially as this Case is, upon a writ of Dimi-
 nution; This writ and no other being certified upon that Record:
 wherefore absente Fleming Chief Justice, it was reversed.

Robertson *versus* Lady Stallage.(6)
Co. 7. 42. b.

Co. 7. 43. b.

Co. 7. 45.

Co. 7. 45. b.

A Case out of the Court of Wards was referred by the Kings special Commandment, to the two Chief Justices, the Chief Baron, Williams and Altham, wherein was first resolved, That a Divorce being by Sentence in the Spiritual Court between Kenne and his wife, *causa præcontractus*, or other cause; The parties being dead between whom it was, the Court of Wards cannot now examine it, to prove another Heir against that sentence. Secondly, that one being by Office found Heir, another exhibiting a Bill, to be admitted to Traverse that Office, shall not be admitted thereunto, until he hath another Office finding him to be Heir; and so hath a Record to aid him, notwithstanding the Statute of 2 Ed. 6. cap. Which Office ought (by special Commission awarded) recite the first Office; and after, upon complaint that one such is grieved, thereby command to inquire whether he be Heir or not: And then he being found to be Heir, shall by the benefit of that Statute be admitted to a Traverse. Thirdly, it was resolved, where a Bill is to be admitted to Traverse, which abates by the death of the Defendant, and a Bill of Reviver is exhibited, which abates by the death or Marriage of the Plaintiff, that there cannot be any other Bill of Reviver: For a Bill of Reviver cannot be after a Bill of Reviver.

Maynay *versus* Collins.

(7)

Pl. Com. 441.
1 Cr. 151.
Ante 171.1 Cr. 282.
Post. 580.

DEbt was brought upon an Obligation 27 Eliz. and a Recovery by Nihil dict: After the Defendants death a Scir. fac. was brought against the Heir, and a Recovery against him upon two Nihils returned, who died, and a new Writ of Scir. fac. was brought against the Heir of the Heir, and a Recovery had against him by Default: And now he brings Error in the Exchequer Chamber; And assigns the Error that there was not any Bill upon the file, as in rei veritate there was not any: But upon suggestion to the Court, that it being an ancient Judgment, the Bill might very well have been imbezelled off the File; And it is mentioned in a note by the Attorneys book, that such a Bill was payed for, to be put upon the File; It was ordered that a new Bill should be put upon the File.

Huscombe *versus* Standing, Trin. 5 Jac. Rot.

DEbt upon an Obligation of 40 l. conditioned, That Richard Street should pay 24 l. upon such a day, &c. The Defendant pleads, that the said Street was imprisoned by one Evely Steward of the Stanneries, and the Plaintiff of Covin with him (without any reasonable cause) detained the said Street in prison against Law, and to the great peril of his life, until the said Street should pay unto the Plaintiff 24 l. or become bound with a surety for the payment thereof: Whereupon, to enlarge the said Street, and to avoid danger of his life, he, and the Defendant as his surety, entered into that Bond, Et hoc, &c. And it was thereupon demurred, and without argument adjudged for the Plaintiff, That it was not any Plea for the surety, although it had been a good Plea for the said Street: For none shall avoid his own Bond, for the imprisonment or danger of any other than of himself only; And although the Bond be avoidable as to the one, yet it is good quoad the other: Wherefore it was adjudged for the Plaintiff. Vide 39 H. 6. 51. 7 Ed. 4. 12. 21 Ed. 4. 13.

(8)

3 Cr. 746.
R. 150.
Dyer 324. a.
1 Rol. 687.

Andrews *versus* Hundred de Lewknor.

Action upon the Statute of Winton of Hue and Cry; And shews in his Count the said Statute; and that such a day, he was robbed of so much within that Hundred; and that he made Hue and Cry; And shews how, according to the Statute of 27 Eliz. And that within 40 days before the Action brought, he was sworn before such a Justice of Peace, that he was robbed of so much, and did not know any of the Felons; And that as yet the Defendants had not taken any of the Felons, nor satisfied him, Contra formam Statuti prædicti unde actio accrevit. After Verdict for the Plaintiff, it was moved, that this Declaration was not good: Because the Action is founded upon two Statutes, and both mentioned in the Declaration, yet he concludes, Contra formam Statuti prædicti, which is not good: And the Court thereupon doubted, and appointed Presidents to be searched; And after divers Presidents of this Court, and of the Common Bench shewn unto them, wherein some were Contra formam Statut. prædicti. And some Statutorum prædictorum: The Court held, that the best form was Statuti prædicti; For the Action was grounded only upon the Statute of Winton, which gives Penalty and Remedy (the other shews only how the examination shall be, and in what time before the Action brought, (otherwise he shall not have the Action:)) But gives not any Action) And Statuti prædicti refers only to the Statute of Winton, which gives the Action; Therefore

(9)

Yelv. 116.

Aute 142.

the best form to declare, is Contra formam Statuti prædicti: And it was adjudged for the Plaintiff.

Holdefworth versus Sir Stephen Proctor.

(10)
Yelv. 110.

Co. 5. 41.
1 Cr. 189.
Post. 443.
3 Cr. 310.

After Verdict for the Plaintiff; It was moved in arrest of Judgment, That the name of the Sheriff was not endorsed to the writ of Distringas with Nisi prius, and therefore was ill; For by the Statute of York, to every Ven. fac. the name of the Sheriff ought to be endorsed, otherwise, it hath been ruled to be ill; and by the same reason, the Sheriffs name should be endorsed to this Distringas also: But it was moved by Hutton Serjeant, that this being but a judicial Process, and the Ven. fac. well returned, (which was that which summoned the Jury who were returned,) the name of the Sheriff is not so necessary to this, and might be well amended, and that it had been so amended in Case of an Habeas Corpus in the Common Bench. But all the Court held, that it was ill, and not amendable, nor aided by the Statutes of 32 Hen. 8. and 18 Eliz. and is all one with the case of a Ven. fac. where the name of the Sheriff is not thereto; which hath often times been ruled to be ill; For it is not any return, nor helped by any Statute: Wherefore it was ruled, that the trial was ill; And a Ven. fac. de novo was awarded.

Aldred versus Mathew.

(11)

Post. 281.
Post. 282.

DEbt: Upon the Statute of 8 Eliz. for suing an Action in anothers name, without his privy, being duly proved by two witnesses, That he shall pay treble Damages to the party grieved, and ten pound to the party in whose name the arrest was made: The Question was, how this proof ought to be, in an Action upon the Statute, whether by collateral proof before: And it was held, that the proof shall be in the same Action, and not in any other course: Wherefore this exception being taken after verdict, it was adjudged to be well enough brought; And Judgment for the Plaintiff. Vide 10 Ed. 4.

Gelley versus Clerk, Pasch. 4 Jac. Rot. 234.

(12)

Action upon the Case; Upon the common custom of the Realm, against the Defendant, being an Inn-keeper of Uxbridge, for not keeping safely the Goods of the Plaintiff being his Guest: Upon Not guilty pleaded, it was found by special Verdict; That the Plaintiff being a Guest in the said house, went from thence to London, and left his Goods with the Defendant, saying, he would return within two or three days: He returned accordingly within the three days, and in the Interim
his

his Goods were stoln when he was absent : And whether the Defendant, as an Inn-Keeper, by the common custom of the Realm, shall be charged without any special promise for the safe keeping of them, was the Question. Foster Serjeant for the Plaintiff, moved that he should ; For when he was a Guest, and left his Goods for so short a time, and promised to return so soon, and returned accordingly, he is all that time accounted as a Guest, and shall be said to be a Guest, to charge the Defendant as an Inn-Keeper, according to the custom of the Realm : And it was adjudged in the Case of Sir Edwyn Sands ; where he came to an Inn, and lodged, and went out thereof in the morning, and left his Cloke-Bag there, intending to return at night, and at night returned accordingly ; and in the Interim his Cloke-Bag was stoln ; that he might have his remedy by an Action grounded upon the common custom : So here, &c. Wherefore, &c. Williams, If one comes to an Inn, and leaves his Goods and Horses, and goes into the Town, and after returns, and in the Interim his Goods are stoln, no doubt but he is a Guest, and shall have remedy ; and so was Sir Edwyn Sands Case : For his absence in part of the day is not material, but he is always reputed as a Guest. So where one leaves his Horse at an Inn, to stand there by agreement at Livery, although neither himself, nor any of his servants lodge there, he is reputed a Guest for that purpose, and the Inn-keeper hath a valuable consideration ; and if that Horse be stoln, he is chargeable with an Action upon the common custom of the Realm. But in the Case at the Bar, where he leaves Goods to keep, whereof the Defendant is not to have any benefit, and goeth from thence for two or three days, although he saith he will return, yet he is at his liberty, and therefore is not any Guest during that time, nor is the Inn-keeper chargeable as a common Officer for the Goods stoln during that time, unless he makes an especial promise for the safe keeping of them ; and the Action ought to be grounded upon it : And of that opinion were all the other Justices, absente Fleming Chief Justice : But because it was a new Case, they would advise ; Et Adjournatur.

Moor 877.

Moor 877.

Beaudely *versus* Brook.

Action upon the Case ; For a disturbance in using a way ; And shews, that the Defendant was seised in Fee of the Land over which the way is, and of other Land ; And by Indenture inrolled, bargained and sold to J. S. Land in Fee, with a way over his Land, and that J. S. let unto him the Land for years ; And the Defendant disturbs him : After Verdict, it was moved in arrest of Judgment ; First, because he doth not shew the Deed of this Lease, and without a Deed the way passeth not. Secondly, because a Lease is pleaded of Land, without express

(13)

express words of the way; and therefore not good: And of that opinion was Yelverton Justice, and he upon view of the Record took another exception, (viz.) that there is not any grant of the way in the Indenture, but only a bargain and sale of Land, and of a way out of his other Land, which cannot be good: For nothing but the use passed by the Deed, and there cannot be use of a thing which is not in esse, as a way, common, &c. which are newly created, and until they be created, no use can be raised by bargain and sale, and by consequence nothing passed by this Indenture; And of that opinion was all the Court, that for this cause the Plaintiff had not shewn any sufficient title: But for the other points, Fleming and all the other Justices held, that the Declaration was good; For when Land is granted with a way thereto, it is quasi appendant unto it, and a thing of necessity: Wherefore by the Lease of the Land (although the way be not mentioned) it well passeth without being expressed in the Deed: And therefore the difference will be, betwixt a grant of Land, with Common or Estovers to be burnt there; if he lets the Land, the Common or Estovers will not pass without a Deed and express words therein, because they be profits *Apprender* in anothers Soil, and are not of necessity; But the Land cannot be used without a way: Wherefore it shall ensue it, and pass of necessity: And unity of possession doth not extinguish it.

Ante 170.
Hob. 234.

Co. Lit. 121. B. *
2 R. 60.

Skinner versus Trobe.

(14)

Action for these words, Thou art forsworn in Collet Court; And doth not shew, that any Action was depending there, nor that it was a Court of Record; and therefore it was moved in arrest of Judgment, and resolved that it lay not; For this Court, without other description cannot take Consuance, that it is a Court of Record: Wherefore it was adjudged for the Defendant.

Moor 404.
Post. 204. 436.
Hob. 283.
Ante 184.
1 Cr. 378.
3 Cr. 135.

Gregg versus J. S.

(15)

DEbt for 600 l: Upon an Obligation, the Defendant demanded Oyer of the Bond, which was sexaginta libris, and for this variance, the Defendant demurs; And it was held by all the Court, that this Obligation doth not warrant the Declaration, for it cannot be taken for sexcenta, but is another sum: wherefore the Bill was abated.

Yelv. 105.
2 Rol. 147.
Ante 147.
Post. 338.
2 Rol. 147.

Dogatte versus Lawry.

(16)

Action upon the Case, in nature of a Conspiracy: For that the Defendant falsely and maliciously, apud West-Allington, charged him with Felony, and there caused him to be brought before

before Mr. Gilbert, a Justice of Peace, and procured him to bind the Plaintiff for his appearance at the general Gaol-delivery in the County of Devon; That the Defendant there exhibited a Bill of Endowment, which was found to be *Minime vera*, whereby he was much damnified, and put to great expences. The Defendant pleads, That he had divers Sheep stolen, and missed divers others, which were found in the Plaintiffs possession, going with twelve Sheep which were stolen; whereupon he complained thereof to the said Mr. Gilbert, who examined him, and finding him variant in his Examination, bound him to appear at the general Gaol-delivery, and the Defendant to give Evidence; Whereupon he at Exeter, at the Gaol-delivery, exhibited his Bill, which is the same Conspiracy. The Plaintiff saith, *De son tort Demesne sans tiel Cause*, and Issue thereupon, and found for the Plaintiff. And it was now moved in arrest of Judgment, first, That this is no Conspiracy, being but by way of complaint to a Justice of Peace. Secondly, That the Ven. fac. is awarded of West-Allington, where it ought to have been also of Exon; for all the Cause is in the Issue: *Sed non allocatur*; for the Plaintiff having laid it to be false and maliciously, and the Jury having found it to be *Sans tiel Cause*, It all appears to be without any ground; and therefore he is punishable. To the second, That the Venue is well awarded, for there only was the Offence, which is only in Issue; wherefore the Trial is good; And it was adjudged for the Plaintiff.

Ante 131.

Post. 432.

Post. 194. 490.

Ante 43.
Post. 266. 513.

Johns *versus* Adams.

ERROR of a Judgment in the Common Bench: The Error assigned, For that in Debt upon an Obligation against Johns, and his *Feme* as Administratrix, The Defendant pleads payment by the *Feme*, after the death of the Intestate, according to the Condition of the Bond; And Issue was joyned thereupon, and found for the Plaintiff; and Judgment given, *Quod recuperet debitum* against them, *de bonis testatoris, & si non, &c.* the Damages *de bonis suis propriis*, where it being a false Plea, (which lay in their own conscience of a payment made in their own time;) The Judgment ought to have been for the Debt, *de bonis propriis*. Secondly, That the Judgment ought to have been for the Damages, *de bonis propriis*, of the *Baron* only; for a *Feme* Covert cannot have any Goods: But the Court held the Judgment to be well given: For as to the first, Although the Plea be false, yet he is altogether a stranger to the Testator; And therefore the Judgment shall be only *De bonis Testatoris*, and not as where he pleads *plenement* administered, which is false in his own conscience. Secondly, Although the *Feme* hath not any Goods during the Coverture, yet because the *Baron* is charged only

(17)

Post. 648.

Cr. 519.

only in respect of the *Feme*, And she might have Goods if she had survived, and Execution might be then taken against her : Therefore the Judgment is good : And so be all the Presidents, as Manne informed the Court : wherefore the Judgment was affirmed.

Sir John Watts, Sir Thomas Lowe, and John Lee
versus George Ognell.

(18)

DEbt for 750 l. and counts, That Sir Thomas Lee was seised in Fee of the Mannor of Billesby ; and the second of October, 42 Eliz. let it to George Ognell for ten years, rendring 250 l. per annu at the Annunciation , and S. Michael ; and that George Ognell entred, and was possessed, the Reversion over to the said Sir Thomas Lee and his heirs expectant ; and he being so seised, a Fine was levied, Hill. 44 Eliz. inter prædict. Johan. Watts, & Thom. Lowe querent. & Thom. Lee, & Mariam ux. ejus deforcientes ds Maner. de Billesby, *sur consance de droit come ceo, &c.* Which Fine was to the use of the said Sir John Watts, Sir Tho. Lowe, and the said John Lee, for nine years ; and afterward of part thereof to the use of Sir Thomas Lee and his *Feme* for their lives, with divers Remainders over ; and for other part thereof, to the use of Sir Thomas Lee for life, with divers Remainders over ; And for thre years arrear at the Annunciation last past, the Action was brought for the 750 l. The Defendant pleads entry and expulsion by Sir Thomas Lee, before the Fine levied : And Issue thereupon, and found for the Plaintiff : And it was now moved in arrest of Judgment, First, That the Issue was not well joyned, for it is upon an entry and expulsion, before the Fine levied, which is not material : For it is alledged, that the Lessor being possessed, and Sir Tho. Lee seised of the Reversion, a Fine was levied : so being possessed at the time of the Fine, although he were expelled before, it is not material : Sed non allocatur ; for being falsly alledged, and found against him, It is not to be disputed whether he were ousted or not, for it is an Issue joyned, and so within the Statute of 32 H. 8. Secondly, It was moved, That the Declaration was ill : For the Fine is not alledged to be levied of the said Mannor, nor by the said Sir Thomas Lee ; For he doth not say, Prædict. Manerium, nor Prædict. Sir Thomas Lee ; And it may be between a stranger, and of another Mannor : Sed non allocatur ; For it shall be intended the same Lessor, and the same Mannor, being named before in the same Declaration ; Et non finitur pluralitas, but being one same name, shall be intended one same person, as 31 H. 7. 30. b. Thirdly, The Declaration is not good, because it is not alledged, That the Lessee upon this Grant by Fine, attorned, nor that he had any notice of the use limited ; For otherwise he is not chargeable for the Rent, in Debt brought against him :

him. For it was said, If a Fine be levied to a use, *Cestuy que use*, shall abow without Attozment, because he hath not any remedy, to compel the Lessee to attozn: yet the use being limited to the Conusee himself (as in this case it is) he hath means to have an attozment before the Fine ingrossed, therefore he shall not abow without attozment: And if it might be without attozment, yet notice ought to be given to the Lessee, for otherwise he should be at mischief; For the use might be limited, and he not having consuance thereof, might peradventure pay his Rent to his ancient Lessor: And therefore it is not reason he should be charged, without notice given unto him, which ought to be shewn in the Declaration: And for proof hereof, the opinion of Popham, Co. 5. Rep. fol. 113. was cited. And of this point the Court doubted: But afterward they resolved, that the action was well brought, and he needed not shew any notice in the Declaration: For in no Declaration in an Abowry notice is shewn; But they agreed, That the Lessee is not bound to pay without notice; and if he hath paid it to his ancient Lessor, it is a good excuse for him, and he may plead it: And if he hath not paid it, the Action gives him notice to pay it to the Grantor; and then he is chargeable for all which is not paid. It was also held, That the Conusors themselves, and a stranger, (viz.) John Lee, being *Cestuy que use*, They take by the limitation of the Use, and are Joynt-Tenants of that Reversion, and therefore they all should have the Action without attozment. Fourthly, It is alledged virtute cujus they were possessionati of the Reversion: And it is not shewn, they were possessed at the time of the action: Sed non allocatur; For being alledged, that they were possessed, and the term being not expired by effluxion of time, It shall be intended they were yet possessed, unless the contrary be shewn: Wherefore it was adjudged for the Plaintiff.

Co. Lit. 309. b.
321. b.
Co. 6. 68. a.
Co. 6. 68. b.

Coxe *versus* Wirrall, Hill. 4 Jac. Rot. 856.

Action upon the Case, in nature of a Conspiracy: For that he falso & maliciose procured him to be endicted of the Ravishment of one Mary Wirrall, and to be detained in Prison for that cause, until he was acquitted, to his Damages, &c. The Defendant pleads, That the said Mary Wirrall being his Daughte, complained unto him that she was ravished by the Plaintiff: Whereupon he shewed it to Sir Thomas Twynn, Justice of Peace in the same County, who convented the Plaintiff before him, and examined him: And upon his Examination, and testimony of others, bound the Plaintiff to appear at the next Gaol-delivery; and bound the Defendant to prefer his Bill of Endictment: Whereupon the Plaintiff

(19)

Yelv. 105.
1 Rol. 113.

C c

appearing

Ante 191.

appearing, he preferred his Bill of Enditement, which was found; And thereupon the Plaintiff was committed, and arraigned, and acquitted; which is the same procurement of the Enditement, and acquittal whereof the Action is brought; And thereupon the Plaintiff demurred; And after Judgment at the Bar, it was resolved that the Plea was good; First, it was agreed per Curiam, that the Declaration to procure one to be falso & maliciose Endited, is good; For as conspiracy lies, where two conspire falsly to Endite one; so Action lies, where one sole, falso & maliciose procures another to be endited. Secondly, although it was alledged, that the Plea was not good, because it is not averred that Felony was committed; and without a fact, suspicion is no cause of arrest, as 8 Ed. 4. 3. 5 Hen. 7. 5. 7 Hen. 4. 35. A multo fortiore, it is no cause without an Act done to endite me; For he was too credulous, to cause one to be endited upon complaint of so small a Girl: And Croke Justice was of that opinion: Yet all the other Justices held, that inasmuch as the Father did it upon his Daughters complaint, to whom by nature he is compassionate; although it had not been cause of arrest for suspicion of Felony, (no Felony being committed) yet it is a good excuse of his cause of complaint to the Justice of Peace, who binding over the one to appear, and the other to prefer the Enditement, it is good cause to excuse him from the malicious procuring of the Enditement, which is the ground of this Action: And all this matter being confessed by demurrer, the Court shall take it for a good cause of excuse; But if it had been alledged, that there was not any ravishment, and that the Defendant knew so much; it might peradventure have been otherwise: Wherefore it was adjudged for the Defendant.

Staineroid *versus* Locock, Hill. 4 Jac. Rot.

(20)
Ante 115,

Assumpfit: Whereas Communication was betwixt the Plaintiff and the Defendant, concerning an Obligation of 40 l. wherein the Defendant and his Father were obliged to one Newbold, in Consideration that the Plaintiff, at the Defendants request, would pay to the said Newbold 60 l. in discharge and redemption of the said Bond of 40 l. before such a day; That the Defendant promised he would assure to the Plaintiff such a Copyhold for 21 years, by such assurance as Edward Drables should devise; And alledged in fact, that he paid the said 60 l. to the said Newbold, before the day, in redemption of the Bond of 40 l. That Drables devised a Letter of Attorney for the Defendant to two of the Tenants to surrender for the said 21 years, and an Obligation for the quiet enjoying; and that he tendered the Letter of Attorney to the Defendant to seal, and he refused: The Defendant pleads Non assumpfit, and

and found against him; And it was now moved that the Declaration was not good, because it is not alledged that he discharged him, Sed non allocatur; For he cannot discharge the Bond, but to pay in discharge: Wherefore he shewed it sufficiently. Secondly, because Drables devised two things to be done, and he alledges request of one only: Sed non allocatur; For the Plaintiff may alledge breach in the one, although the other be performed, and it is in his election which he will demand: wherefore it was adjudged for the Plaintiff.

Hadefden *versus* Gryffel, Pasch. 5 Jac. Rot.

TRESPAS: Clausum fregit called the Heath, apud Layton Bussard, the 11. Decemb. 4 Jac. nec non the same day, liberam Warrennam of the Plaintiffs apud Layton predict. intravit, and took, killed and carried away Conies: The Defendant pleads to all the Trespases, besides the Entry into the Close called the Heath, Not guilty; quoad that, he Justifies; For that he was seised in Fee of a Messuage and Land, and had Common by prescription appertaining thereto, in the place where, &c. And that he was ready to use his Common, and many Conies being there damage Feasant, and spoiling the grass, he entred to chase them out, lest they should increafe, &c. Whereupon the Plaintiff demurred: And after argument, the Court adjudged, that the Plea was not good; For a Commoner hath nothing to do with the Land, but to put in his Cattel, and may not meddle with any thing of the Lords there; And as the Lord may have great beasts there, so he may have beasts of Warren, and the Commoner cannot destroy them, F. Nat. Br. 121. And if the Lord by reason of them should surcharge the Common, and deprive him of his Common, he ought to have his remedy by Assise, or Action upon the Case; But he may not kill the Conies, no more then he may kill any other beasts of the Lords: And so long as Conies are in the Lords own land, the Lord hath property in them, and may say Cuniculos suos; But when they go out, he hath no longer property in them, 22 H. 6. 59. 10 H. 6. 13. 46 Ed. 3. 2. 3 H. 6. 55. And therefore they being in the Lords land, the Commoner may not meddle with them, nor ought he to come there, but to use his Common: Then when he shews, that his intent was to enter to chase the Conies, that Entry is tortious: wherefore it was adjudged for the Plaintiff. Note, at the first motion the Court was of opinion against the Plaintiff; That a Commoner might destroy Conies, for they are *fera natura*: But afterward upon better consideration, and upon view of a President between *Bellem* and *Langdon*, Pasch. 44 Eliz. in this Court, and for the reasons before recited, all the Justices upon the second motion adjudged for the Plaintiff: And it was resolved accordingly.

(21)
Yelv. 104.
1 Rol. 405.
F.N.Br. 86.m.

1 Cr. 388.
Post. 208.
Post. 229.

1 Rol. 403.

1 Cr. 554.

3 Cr. 876.
1 Rol. 405.

The Earl of Lincoln *versus* Roughton, Pasch. 4 Jac. Rot.

- (22) **S**candalum magnatum : For that the Defendant spake these words, My Lord (præfat. Comit. de Lincoln innuendo) is a base Earl, and a poultry Lord, and keepeth none but Rogues and Rascals like himself. The Defendant pleaded Not guilty, and found against him ; And after Verdict it was moved in Arrest of Judgment, that these words were not actionable ; For they touch him not in his life, nor in any matter of his loyalty, nor import him in any main point of his dignity, but are only words of spleen concerning his keeping of servants, which is not material : And to that opinion Yelverton and Fleming seemed to incline : But Williams and Croke to the contrary, because they touched him in his honor and dignity ; And to term him base Lord and poultry Earl, is matter to raise contempt betwixt him and the people, or the Kings indignation against him ; And such general words in case of Nobility will maintain an Action, although it will not in case of a common person : Wherefore they held, that the Action lay ; Fleming absente, Adjournatur : Afterwards Roughton died, and the Bill thereupon abated.

Roswel *versus* Vaughan, Hill. 4 Jac. Rot. in the Exchequer.

- (23) **A**ction upon the case in nature of Deceit : Whereas upon the ninth of June 35 Eliz. Queen Eliz. was seised in Fee of the Advowson of the Vicaridge of Southstoke, whereto the Tythes in S. appertained ; To which Vicaridge, the Defendant ninth June 35 Eliz. affirmed, that he was lawful Incumbent, and had right to the Tythes, from the death of Thomas Vaughan the Incumbent ; whereupon the Plaintiff 16 June 35 Eliz. having communication with the Defendant about his buying of the Defendant the Tythes appertaining to the said Vicaridge, after the death of the said Thomas Vaughan, (who died 16. April, 35 Eliz.) until Mich. following, That the Defendant, adtunc sciens that he had not any right or interest to the Tythes, whereas he never was instituted and inducted, but that they appertained to Evan Thomas, sold them to the Plaintiff for 30 l. falso & deceptive, and alledgeth in fact, that Evan Thomas was presented, admitted, instituted and inducted to that Vicaridge ult. August. 35 Eliz. and took the Tythes, and so the Plaintiff lost them : The Defendant pleads Not Guilty, and found against him ; And it was now moved in Arrest of Judgment, that the Action lay not ; For an Action in nature of deceit lies not, where one sells a thing which he hath not any property in : And although he took upon him in discourse, that he was owner, and had right to sell, unless he warrants that the other should enjoy it accordingly, (which warranty ought to be at the time of the sale,) it is not good ;

good ; But here is not any warranty nor affirmance at the time of the sale, that he had any right or title to sell ; For his affirmance that he was Vicar, and had right to sell, was upon the ninth of June, and the sale was 16. June after ; And in proof hereof he relied upon 5 H. 7. 41. 9 H. 7. 21. And Chandler and Lopus his case, Pasch. 1 Jac. quod vide ante fol. 4. And of that opinion were Tanfield Chief Baron and Altham : But if a man sells Actuals which is corrupt, without warranty, an action lies ; Because it is against the Common-wealth, as 9 H. 6. 53. 7 H. 4. 15. & 11 Ed. 4. 6. And although the Book of A. 42 Aff. pl. 8. was objected, where one took goods from another, and sold them, and the Owner retook them ; That an Action upon the Case was brought in nature of deceit : For this falsity in sale, without any warranty, Tanfield thereto answered, That the said Book is not adjudged, but the party admits it, and takes Issue ; Yet if it were allowed to be Law, it is, because he there had possession by *Tort*, and so had colour in shew to be Owner ; And he was deceived by buying of him, who had only gained a *Tortious* possession : And although he had not any right, yet every one took Consuance of him as Owner, and he himself knew that he was not right Owner ; which is the reason that the Action was maintainable : But here he had not any possession ; And it is no more, then if one should sell Lands wherein another is in possession, or a Horse whereof another is possessed, without covenant or warranty for the enjoyment, it is at the peril of him who buys, and not reason he should have an Action by the Law, where he did not provide for himself : Wherefore it was adjudged for the Defendant.

Post. 470.

Post. 474.

NOte, The last *Thursday* of this Term Sir *Thomas Foster* Serjeant was made Justice of the Common Bench : And upon the *Saturday* following, (being the last day of the Term) Sir *Edward Heron* being an ancients Serjeant then *Foster*, was sworn one of the Barons of the Exchequer ; And because he was sworn after the other, lost his antiquity of him, although they were both sworn in one day. (24)

Fane *versus*

OWare impedit : For the Church of Craneheld in Com. Bed. It was held per Curiam upon the evidence, and so delivered for Law, that where a person makes a lease for 61 years, and the Lady Eliz. (in the time of Qu. Mary) being Patroness for life, and afterwards Queen, having the Inheritance of the Advowson descended unto her, presented Fane ; That he, coming in by the Patroness, who confirmed, cannot after the death of the Queen avoid this lease : Fane afterward the 12. July 1 Jac. made a Resignation into the hands of a publick Notary : The 13. July (25)

July 1 Jac. the King presented him again : Afterward, the 19. of July, the Notary certified this resignation to the Bishop, who the same day admitted, instituted, and inducted Fane again : It was held, first, that the Kings presentation, (before the Bishop accepted the Resignation) was void ; For the Church was full, and the admission and institution again was void. Secondly, whereas afterward the King 19. Sept. 1 Jac. granted the Mannor with the Advowson to M. Ann. That the Presentation did not pass, because the Church was void by the Resignation at the time of the Grant : Afterward the fourth of July 2 Jac. Fane resigned again, and the King presented him, who was disturbed by the Defendant, the Queens Presentee : Whereupon the Quare impedit was brought.

Mallet versus Sackford.

(26)
1 Rol. 610.

Post. 451.
1 Cr. 230.

Co. 8. 95. a.

UPON a special Verdict, the Case was ; W. Mallet Lessee for 60 years, deviseeth it in this manner : *Item*, I give to my wife, and my Cousin, my Term for their lives, and afterward to such persons as shall remain in my house at *Normington* at the time of their decease : The *Feme* survives the Cousin, and assigns the Term to another, under whom the Defendant claims ; and that William Mallet Cousin and Heir of the Lessor entered, and lets for years ; the term expires, the Lessee continues in possession until the time of the death of the *Feme*, Et si, &c. The first question was, whether this remainder of a term were good or not ? Coke and Walmsley held, That it was not, because it was but a possibility ; And there cannot be any remainder thereof, and no Counsel can devise how much a remainder by any Act can be executed : And therefore Coke said, it cannot be good in a Will ; For that were to make that good which by counsel could not have been advised. But Warberton and Daniel to the contrary, and relied upon the authorities of *Weldons Case*, *Paramors Case*, and *Pierpoints Case* : Wherefore, &c. A second question was, whether this Tenant at sufferance shall be said to be in possession to have benefit of this remainder : But little was spoken thereto ; Et Adjournatur.

Bayly versus Stevens.

(27)
1 Rol. 623.

PER Curiam, where Lands in Borough-English descend to the youngest Son, and he dies without Issue, That it shall not go to the younger Brother ; For that Custom doth not hold place betwixt Brothers, without a particular Custom, but the eldest Brother shall have it.

Baron Snigg *versus* Shirton, in the Star-Chamber.

The Case was ; That Shirton being tenant for years, Baron Snigge purchased the Reversion, and payed unto him rent for 15 years : Before the end of the Term, one Chambers came to Shirton, and perswaded him that Alexander Staples had title to the Land, and advised him to take a Lease from him, whereupon he took a Lease of him for ten years, rendying 70 l. per ann. And the Land was worth 140 l. per annum : And willed him to hold the possession against all persons ; and he at the end of his first term, kept the possession with Dum, Guns and Holberts, &c. (The Dum was only to give notice if any came to enter, but no body offered to enter) He was censured for this, being a Riot and forcible detainer, although none other offered to enter : For it was held, that the possession of the Term was the possession of the Lessor ; And when at the end of the term he kept it against him to whom he had so long payed his Rent, It was a forcible detainment. And whereas the Statute is, that where one hath had possession for three years quietly, he might hold the possession with force ; that is to be intended where the Estate is continued ; And for this offence Shirton was fined 500 l. And Chambers for counselling and stirring up that title was fined 300 l. And all the servants in the house which kept it with weapons, were fined 10 l. a piece ; But Alexander Staples was not censured, for he made the Lease only, but did not command him to keep the possession with force. (28)

F.N.Br.249.c.

Anonymus.

Prohibiton ; It was held per Curiam, That tythes of Byrch shall be payed, although it be of 20 years growth, and more ; to of Holly, Alders and Maple ; And (the principal question being concerning Byrch,) a consultation after some advisement was awarded ; And Coke cited one Leonards Case. 34 Eliz. to be so adjudged. (29)

3 Cr.1.

Beal *versus* Shepherd.

Rplevin : The Case was ; A Copyholder in fee surrenders to the use of his Will, and by his Will deviseth to his wife his Copyhold Land ; And if she hath Issue by the Devisor, That the Issue shall have it at his age of one and twenty years ; And if the Issue die before that age, or before his wife, or if she hath no Issue, That then she shall chuse two Attorneys ; And she to make a Bill of sale of my Lands to her best advantage, &c. It was held per Curiam, That she hath those Lands for (30)

for life, and the not having Issue, hath not any interest to dispose, but hath authority by his Will to nominate two who shall sell, and they may make sale; and the Aendee shall be in by the first Will; and there needs not be any new surrender.

Middleton *versus* Weeks.

(31) **D**Ebt upon an Obligation; Condition to stand to the Arbitrement of J. S. and J. D. of all matters and Controversies between them, so that the same award be made of the premises before such a day, &c. The Defendant pleads nullum fecerunt arbitrium of the premises: The Plaintiff shews an award: The Defendant saith, That such other things were in Controversie, whereof they had not made any award: And it was thereupon demurred, because it was not shewn, That the Arbitrators had notice of such things in Controversie; For it sufficeth, If the Arbitrators make an award of such matters whereof they are informed: Coke, The submission being of all matters, with an ita quod it be made of the premises, there it ought to be made of all things whereof they have notice, or information given them, otherwise it is not good: But if it be without such a clause of ita quod, &c. If they make an award of two matters, and do not speak of the residue, although they had notice of them, it is well enough: But if there be a submission of three things, or more particularly, with a general clause of all other matters; There they ought to make the Arbitrement of those which are particularly named, without other notice; For of them they have notice that they are in Controversie by the submission: But of the other matters they shall not take notice, unless by information from the parties; And it is like to the Case where Commissioners of Bankrupts make sale for the benefit of the Creditors, it sufficeth, if it mentions those who complained; And this difference hath been oftentimes adjudged; And to that opinion the other Justices inclined: But they would advise. Vide 7 H. 6. 40. 19 H. 6. 6. 39 H. 6. 10. 12. 4 Eliz. Dyer 216.

Castle *versus* Dod.

(32) **U**Pon a special Verdict the Case was; That A. Tenant for life granted by Fine his Estate to B. And by Indenture limited the use to B. for the life of A. and B. and if he died, living A. That it should remain to C. Afterward B. died, living A. C. entred and let to D. for years, and died, living A. Whether the Lessee should retain this as an occupant, living A. or that A. should have it again, (because no other use is limited after the death of C. by reason of his ancient use) was the Question: And after argument, it was adjudged, That C. should have it as an occupant, and his Lessee should hold it as an

an Occupant, and that A. had not any residue of the use in him : 2 Rol. 782.
 For although, where Tenant in Fee makes a Deed of Feoffment, and limits the use for life or in Tail, and doth not speak of the residue, it shall be to the Feoffor, or Conuſor, because he had the ancient use in him in Fee ; yet when Tenant for life, or he who hath a particular Estate, grants his Estate by Fine, and limits the use for years, or for a particular time, it shall not return unto him, but be to the Conuſee, although the Fine were without any consideration ; Because he who hath the particular Estate by Fine, is subject to the ancient Rent and forfeiture, which is a sufficient 2 Rol. 781. 2.
 consideration to convey the Estate unto him. And although it was objected, That at the Common Law there was not any Occupant of an use, and this Statute hath vested the possession in such manner and nature as the use was, Ergo there shall not be an Occupant of a possession vested to an use. Coke said, This Statute is intended, That the Land shall have the same qualities as the use had, (viz.) if the use was a conditional Estate in the Land, it shall be conditional, but it shall not have the collateral qualities as the use hath ; For there shall be a Tenancy by the Courtesie of such an Estate vested, and it shall be Assets ; And by the same reason, there may be an occupancy ; For the use and Land are now incorporated and of one nature : And therefore it was resolved in Bakers case, Although the use may be waded without matter of Record, yet the Estate vested to an use cannot at this day be waded : Wherefore, &c.

Termino Hillarii,

Anno quinto JACOBI Regis in Banco Regis.

Smith *versus* Turnor.

(1)
Yelv. 104.
1 Rol. 69.

3 Cr. 193.

3 Cr. 191.3.

Action upon the Case for these words; Thou art no true Subject to the King, and that I will prove: The Defendant pleaded Not guilty, and found against him. It was moved in arrest of Judgment, that these words were not Actionable; Because they be too general: And after divers motions, resolved by the Court, That the Action lies not; For the words in themselves do not necessarily imply any slander which toucheth him in his loyalty; For it may be intended, that he was not a true Subject, having been false in some office; or being an Accountant had not made a true account: And although the Case of Sir William Walgrave against Agas, was cited, which was there resolved and adjudged; That for saying to a servant of the Plaintiffs, Thou servest no true Subject, an Action lies; The reason there was, because it was shewn, he was a Justice of Peace and a Deputy-Lieutenant, and near in service about the Queen; And therefore such words of him would maintain an Action: But being laid barely here without circumstances, the Action lies not; wherefore it was adjudged for the Defendant.

Lane *versus* Alexander.

(2)
Yelv. 122.

1 Cr. 501.
Post. 620.

Ejectione firmæ: The Defendant intitles himself by Copy, granted 44 Eliz. The Plaintiff by replication intitles himself by Copy, granted 1. June 43 Eliz. The Defendant maintainis his Bar; And traverseth Absque hoc, That the Queen 1. June 43 Regni sui granted the Land by Copy modo & forma prout, &c. And the Demurrer being general, it was moved, That this Rejoinder was not good; For the day and year of granting the Copy is not material; but only whether it were granted before the Copy made to the Defendant; And therefore he ought to have traversed absque hoc, That the Queen granted modo & forma prout, &c. But it was then moved, in regard it is but matter of form, and is not shewn for cause, That it is aided by the Statute of 27 Eliz. Sed non allocatur; For the day ought not to be made material, unless the Queen had granted by Copy before the Grant to the Defendant, The traversing also of the day, where it ought not,

not, is matter of substance; For thereby he makes it parcel of the Issue, which should not be: Wherefore it was adjudged for the Plaintiff.

Hales *versus* Whyte, Trin. 4 Jac. Rot. 376.

Error: *Baron and Feme* bying Trespas of Battery against *Baron and Feme*, for the battery of the *Feme* of the Plaintiff. (3)
Upon Not guilty pleaded, It was found, that the *Baron* was not guilty, and that the *Feme* only was guilty: And the Judgment was, Quod Capiantur; And for this cause the Error was assigned: For it should have been a misericordia, only for the *Baron*: But the Judgment was affirmed; And Manne the Secondary shewed to the Court, that so it was adjudged in the Erchequer-Chamber, in a Writ of Error upon a Judgment in this Court. Vide 22 Ass. 57. Contra. 1 Cr. 407. 513.
Post. 440.

Matthew *versus* Purchins, or Burching *versus* Vaughan, Hill. 3 Jac. Rot. 547.

Debt upon an Obligation, and demands 6 l. 13 s. 4 d. The Defendant demands Oyer of the Bond, which was (viz.) (4)
2 Rol. 146.
Noverint, &c. Teneri in vigint. Nobulis, &c. And being entred in hac verba, It was thereupon demurred for this variance: For it was moved, that Nobulis is not of any sense; For there is not any such word. Afterward the Dictionary of Tho. Thomasius was shewn, wherein Nobilis is set down for a Noble man; also the sum of 6 s. 8 d. And for this cause it was resolved, that the Bond was good; And therefore adjudged for the Plaintiff. Pet Williams said, that it was adjudged in the Common Bench, where one was obliged in Viginti literis pro libris, that it was a void Bond. Co. 10. 133. d.
Ante 147.
Post. 603.

Farnely *versus* Bassett, Trin. 5 Jac. Rot. 738.

Debt upon an Escape, against the Sheriff of Norwich: Upon Demurrer the case was; That a Plaint of Debt being affirmed in Norwich, an Habeas Corpus was awarded, to bring the Body, with the Cause, before the Lord Popham Chief Justice; bearing date the 19. June, which was the last day of the Term; And he thereupon accepted Bail: After the Bail accepted and filed, Procedendo was awarded, dated the last day of the Term: And thereupon they proceeded, and Judgment was given; And whether the Sheriffs are discharged, or chargeable with the Prisoner, was the question: And it was resolved, that the Sheriffs are discharged; For when a Writ of Habeas Corpus is returned, and Bail accepted; Although they be not filed, yet presently the Prisoner is discharged, and his Sureties also in the Inferior Court: And although afterward a Procedendo (5)
Yelv. 120.
Post. 363.

Post. 561.
Hob. 318 9.

is awarded, bearing Teste the same 19. June, (as of necessity it ought, being a judicial Process to bear Teste upon some day in Term) and that the Cause is remanded, yet the Sureties and Sheriffs are discharged: But he may proceed against the party, as if he had not been imprisoned, and not otherwise: Wherefore it was adjudged accordingly. Vide 31 H.8. Bro. procedendo.

Stodden *versus* Harvey, Trin. 5 Jac. Rot. 587.

- (6) **T** Respass: Upon Demurrer the Case was; Lessee for life of a House and Pasture land dies; his Executors suffer his Cattel to go there for six days after his death, and then removed them: And in Trespass, justice for that time; averring, that in that time of six days, they could not procure any other, Land or place to put in the Cattel: Whereupon it was demurred; And whether that were a convenient time to remove them, was the question: And the Court seemed to incline, that six days is but a convenient time for the removing of their Cattel; And the Law allows a convenient time for their removing, especially it being averred, that they had not any other place to remove them unto. Vide 18 Ed. 4. 22 Ed. 4. 27. But for a fault in the Plea, wherein he pleaded a Lease of the House, but not of the Land in the Declaration mentioned, it was adjudged for the Plaintiff.

Co. Lit. 56.b.

Colome *versus*

- (7) **A**ction for these words: Arthur Colome is a forsworn man, and hath taken a false Oath in his Deposition at *Tiverton*, where he waged his Law against me. Being moved in arrest of Judgment that the Action lay not: It was adjudged for the Plaintiff.

Ante 190.
3 Cr. 573.

Cotes *versus* Kettle.

- (8) **E**rror of a Judgment in Bury: Action for these words; whereas the Plaintiff was a Cooper, and had used that Trade twenty four years, and thereby had gained his living: The Defendant said of the Plaintiff, He is a very Varlet, and a Knave. And upon this the Plaintiff had Judgment there: And Error now assigned, that the words were not Actionable; And for this cause reversed.

Powell *versus* Hutchins.

- (9) **A**ction for these words; Thou art a theevish Rogue, and hast stolen bars of Iron out of other mens windows: It was held that the Action lay not: For the bars of Iron are parcel of the Freehold, and the stealing of them is not any Felony: And it shall

shall not be intended of bars of Iron lying in windows, as was objected that it might be; For it shall be taken in the best sense for the Defendant: And it was said, that it was adjudged in one Bridges Case, that for saying, Thou art a Thief, and hast stolen my Corn in the field; no Action lies: For it shall be intended standing Corn, which is not Felony. Wherefore it was adjudged for the Defendant.

Ante 66.
Post. 514.

Ante 40.
Cr. 428.

Brashford versus Buckingham.

ERror of a Judgment in the Kings Bench, in an Assumpsit by *Baron and Feme*, during the Coverture, In consideration the would cure such a wound, that he would pay unto her 10 l. And alledges in fact that she had cured the wound, and he had not paid, to the damage of the *Baron and Feme*: And it was assigned for Error, that the *Baron* sole should have had the Action: For being a promise during the Coverture, the non-performance is only damage to the *Baron*, and not to the *Feme*: But for that the Cause and Act is arising only from the labour and skill of the *Feme*, Therefore the Action well brought; And the Judgment was affirmed.

(10)
Ante 77.

Termino

Termino Paschæ,

Anno sexto JACOBI Regis in Banco Regis.

Faldowe *versus* Ridge.

(1)
Telv. 74.

Trespas; The Defendant pleads in Barr; The Plaintiff replies, and the Demurrer was upon the replication, and adjudged for the Defendant, whereupon the Plaintiff brought Error, and that Judgment was Reversed, and adjudged, that the Plaintiff recuperet, and the Record remanded; And the Plaintiff in the Kings Bench had a Writ to inquire of Damages, which being returned, It was moved, that there could not be any Judgment for the Plaintiff: For it is out of the Statute of 27 Eliz. which appoints, that if Judgment be reversed in the Exchequer-Chamber, or affirmed, the Record shall be remanded unto the Kings Bench, and execution done thereof, according to Law: But here is a new Judgment to be given, which is not mentioned in the Statute; And they cannot give any Judgment contrary to their former; So it is *Casus omisus*: But all the Court held, that it is not reason the party should be without remedy, which would be, if such manner of exposition should be made: And the Law intends, that execution shall be made upon the Record remanded, and that all shall be done which appertains thereunto; So that in this Case, a Writ of Inquiry of Damages is to be awarded, which being returned, there is a second Judgment to be, that the Plaintiff should recover the damages found; And if Judgment had been given in Trespass in the Common Bench for the Defendant, and Reversed in the Kings Bench, such course should have been taken, as if the first Judgment had been given against the Defendant: The same reason is here; And therefore there shall be the like course and Judgment: And it was adjudged accordingly.

Ante 95.

Woodford *versus* Deacon.

(2)

Error in the Exchequer-Chamber of a Judgment in the Kings Bench: The Error assigned; Because the Plaintiff in an
Assumpsit

Assumpsit declares, that the Defendant being indebted unto him, assumed to pay, &c. And doth not shew for what cause the debt grew, (viz.) for Rent, or by specialty, or by Record: And if by any of those means, a general Assumpsit lies not; And for this cause all the Judges and Barons held it to be Error: But if it had been, That he being indebted for divers Wares sold, or for such like contract, assumed to pay, &c. It had been good enough for the generality thereof; And because a Recovery in this Action should be a Barr of such a debt: Therefore, for this reason it was Reversed, although it was objected, that there be many Presidents of such Actions in the Kings Bench. The like Judgment was given between Fayreclough and Seed; And Mich. 6 Jac. Buckingham *versus* Costerden; quod vide postea fol. 213.

Co. 6. 31.
Post. 397.

Hob. 5.
Post. 245.

Ante 110.
Co. 10. 77. 2.

Kempton *versus* Bartells.

ERror in the Exchequer-Chamber, of a Judgment in the Kings Bench: The Error assigned; For that in Trespas, the parties being at Issue, and tryed by Nisi prius, the Record was entred in this manner; Ad quem diem, &c. J. S. J. D. &c. of the principal Pannel veniunt & Jurati exist. & quia residui did not appear, &c. W. N. & J. N. &c. de novo apponuntur, qui ad veritatem de infra-content. electi, triati & jurati, dicunt super Sacramentum suum, &c. omitting these usual words simul cum aliis juratoribus primus impanellat. And for this cause, it was a Verdict only given by those of the Tales, and not by those with whom they were sworn: And of this opinion were all the Judges and Barons: Wherefore it was Reversed.

(3)

Ante 119.
Yelv. 214.

Strickland *versus* Thorp.

Trespas de clauso fracto was brought by Thorp against Strickland, with a continuando from the 20. Junce 3 Jac. until the 6. of Novemb. following. Upon Non guilty pleaded, it was found for the Plaintiff, and Judgment thereupon: But no Entry of the Fine, Quia pardonatur. Strickland brought a Writ of Error, and assigned; That the Judgment should have been entred with a Capiatur pro Fine; For that the King and Parliament had pardoned all offences committed before and until the 25. of Sept. And this Trespas being alledged to have continued until the 6. of Novemb. following, there was but part of the Trespas pardoned; and therefore there should have been a Capiatur. But the Court held, that the Judgment was well entred; For the first trespas, (which was vi & armis) being pardoned, the Continuando (being as to the consuming of the grass) is for the increase of Damages only, &c.

(4)

Yelv. 126.

Hob. 189.

Termino Trinitatis,

Anno sexto JACOBI Regis in Banco Regis.

Kentick *versus* Pargiter.

(1)
Yelv. 129.
2 Rol. 267.

Ante 195.

Post. 257.
Post. 436.

TRESPAS de clauso fracto, &c. The Defendant justifies the taking of the Cattel *Damage fesant*, pretending a custom, that the Plaintiff being Lord, hath the place in which, &c. intirely to himself, until Lammas-day : And that afterwards it is Common for the Tenants ; so as the Plaintiff can then put in three Horses only : And because the Plaintiff after Lammas had put in more than three Horses, the Defendant took them *Damage fesant*, prout, &c. Issue being joyned upon the custom, and found for the Defendant ; It was moved in Arrest of Judgment, That the Defendant could not take the Cattel *Damage fesant*, because he is only a Commoner, and the place where, &c. is the Plaintiffs soil, so as his own Cattel cannot be *Damage fesant* upon his own ground : But by Fenner and Williams, The taking the Lords Cattel *Damage fesant* was good : For the Lord is to be excluded by the custom for all but only his stint, and may well by such a custom be restrained and limited : Nor have the Commoners any other remedy to preserve their right and benefit in feeding their Cattel, but by taking the Lords Cattel if he offend. But the Chief Justice and Yelverton doubted thereof ; For although the Commoners had gained by the custom the sole feeding of the Lords soil ; yet they ought not only to have shewed the custom, but also the usage to have distrained the Lords Cattel, *Damage fesant*, when he exceeded his Stint.

Parker *versus* Rennaday.

(2)
Hob. 19.
2 Rol. 147.

DEbt brought upon a Bond for 60 l. The Bond was in Italian, and the Sum therein expressed was in these words (viz.) *In cessanta libris*. And adjudged to be good.

Sharpley *versus* Hurrel, Pasch. 6 Jac. Rot. 75 i.

(3)

DEbt upon an Obligation : The Defendant pleaded the Statute of Usury, and sheweth that a Ship went to fish in Newfoundland (which Voyage might be performed in eight months)

months) and that the Plaintiff delivered 50 l. to the Defendant, to pay 60 l. upon return of the Ship of Dartmouth: And if the said Ship by occasion of Leakage or tempest, should not return from Newfoundland to Dartmouth, then the Defendant should pay the principal money, viz. 50 l. only: And if the Ship never returned, he should pay nothing. And it was held by all the Court, ^{Post. 508.} not to be Usury within the Statute. For if the Ship had stayed at Newfoundland two or three years, he should have payed at the return of the Ship but 60 l. and if the Ship never returned, then nothing: So as the Plaintiff ran an hazard of having less then ^{Co. 5. 70. a.} the Interest, which the Law allows; and possibly, neither Principal nor Interest.

E c

Termino

Termino Michaelis,

Anno sexto JACOBI Regis in Banco Regis.

Adams *versus* Steer, & alios.

- (1) **E**jectione firmæ; Of a lease from Henry Nudigate: Upon evidence to a Jury, it was resolved; Whereas Francis Nudigate being Tenant for life, in right of the Dutchess of Somerset, his Feme; The Earl of Arundel by his Indenture aliened, bargained and sold the land and reversion to Francis Nudigate and his Heirs, for money; And the Deed had not therein the word Grant, nor was inrolled within the six months; That the reversion passed by the word alien, with Attornment: Denton and Fettiplace his Case in the Court of Wards 30 Eliz. was cited; Where it was resolved by the opinion of two Chief Justices, That by the words of Bargain and Sale only with Attornment, a Reversion passeth not.

R. 569.

Moor 34.

Cook *versus* Laneday.

- (2) **E**rror: Of a Judgment in the Exchequer, in an Information upon the Statute of Usury: The Jury found upon Not guilty pleaded, Quod quoad corruptum agreementum in informatione prædict. Specificat. The Defendant was guilty; And that he took the profits of such land, let unto him for performance of that corrupt agreement, to the value of 60 l. But it is not found, that he lent the 100 l. prout the Information: And for this cause, it was resolved in the Exchequer, That the Verdict was void, and should not be taken by intendment that it was lent, otherwise he might not take the profit: Wherefore a Ven. fac. de novo was awarded; And the Jury appearing after Evidence, the Plaintiff was Non-suited, and Judgment given accordingly, and 40 l. Costs to the Defendant, Whereupon Error was brought. The first Error assigned was, That the Verdict was well enough, and so there ought not to have been a new Trial. But the Court held clearly, the Trial was ill and imperfect for the reason aforesaid. A second Error, That in regard the verdict was but imperfect, he ought not to have had a Ven. fac. de novo, but a Distringas jurator. de novo to make their verdict perfect. But Coke and Fleming chief Justice held clearly, That the Jury having once given their Verdict, although it be imperfect, shall never be sworn again upon the same issue, unless it be in Case of Mistake, when

Post. 508.

when the party is to recover by view of the Jurors. Vide 21 H. 6. 20. 20 Ed. 3. Offic. de Court 20. 2 Maria. Bro. in quest. 86. Wherefore the Judgment was affirmed.

Beecher *versus* Sir Thomas Shirley.

Error: Of a Judgment in debt upon an Obligation, (where (3)
the condition of the Obligation being, that 100 l. should be paid at the house of Sir Thomas Shirley in White-Fryers; The Defendant Sir Thomas Shirley pleads payment, and found against him;) And because the Jury were of the Parish of Saint Dunstons, &c. And it is not averred in the plea, that the house was in that Parish: The Court being thereupon in doubt, after divers motions, the Plaintiff Beecher was content that a discontinuance should be entered, intending to bring a new Action of Debt; But by the negligence of his Attorney, it was entered in this manner, Et prædict. Willielmus Beecher per J. H. Attornat. suum venit hic in Curia, & fatetur se nolle ulterius prosequi, ideo considerat. est quod Defendens eat inde sine die: And in a new Action upon this Bond, this Judgment was pleaded in Bar; For it is a Retraxit, which is an absolute Bar; And it was held to be a good Bar: whereupon he brought Error upon the first Judgment. The first Error assigned was, For that the Retraxit ought to have been in proper person, and not by Attorney; For that is quasi a departure from his Warrant; For he hath not any such Warrant; And it is as a departure in spite of the Court, and as a contempt; and it cannot be a departure unless it be by the party himself: And of that opinion were Fleming and Cook. A second Error was, because the Judgment was not quod Defendens sit inde quietus; But they held it to be well enough: For eat sine die, and sit inde quietus, are both of one effect. Thirdly, for that there is no Judgment against the Plaintiff to be in Misericordia, which was held to be Erroneous; And that the Plaintiff himself, in whose advantage it was omitted, might assign it for Error in the Judgment; For in every Case, the Plaintiff and Defendant ought to be in Misericordia or Capias, unless the Defendant comes primo die, and confess the Action; For it is for the Kings benefit, and therefore may be well assigned for Error by either parties. Fourthly, it was shewn, that there was a discontinuance; For there is not any continuance from Mich. 2 Jac. (at which time the Verdict was given) to Mich. 4 Jac. (at which time the Judgment was given;) And that it now was well assignable for Error, and not aided by the Statute of *Feoffails*, because the Judgment is not given upon the Verdict; for then it had been good, although it were after Verdict; But is upon the Retraxit, which is out of the Statute. And it was said, that a discontinuance can never be objected, pendente placito before Judgment;

Et 2

For

Co. 8. 58. a.

Post. 213.

Co. 8. 58. a. b.

Co. 8. 58. a.

1 Cr. 505.
Co. 8. 59. a.

Post. 286. 304.

For it may be continued at the pleasure of the Court : But after Judgment in another Term, it may be well rejected ; And no continuance can then be entred : Wherefore it was reversed.

Nannge *versus* Rowland ap Ellis and three others.

(4)

3 Inst. 164.

UPON a reference out of the Star-Chamber upon Bill, and Demurrer thereupon, the question was ; Whereas an information was brought in the Exchequer against Nannge, for an intrusion into Lands of the Kings in D. in the County of Merioneth, and for cutting down 10000 Oaks : He there pleaded Not guilty ; whereupon being at Issue, and found at the Bar against Nannge, The Defendants being produced at witnesses for the King, it was sworn, that the Land was a great waste, parcel of the Kings possession ; And that the said Nannge and one Dale, and others by his Commandment, had cut down 1500 Oaks, every one of the value of 20 s. whereupon the Jury found Nannge guilty to the value of 1500 l. And thereupon he brought his Bill of Perjury, alledging that the Land was not the Kings Land, that they did not cut down any trees at all, and that there was not any there of that value. The Defendants in the Star-Chamber pleaded, that they were produced as witnesses for the King, being compelled thereto by process ; that they swore for the King ; that their Oath was affirmed by the Verdict : wherefore they demanded Judgment whether they should be compelled to answer. This matter being referred to the two Chief Justices ; They resolved, that the Defendants ought not to answer to the right of the Land ; For it would be inconvenient to examine it in that Court ; but to the Perjury, alledged in cutting down the trees, for the number and value of them ; which being an apparent matter of fact, it is reason it should be examined ; And if they swore falsely, although they were for the King, that they should be punished, as for an offence at the Common-Law ; But they could not be punished upon the Statute of 5 Eliz. for it is out of that Statute.

Ante 120.

Trollop *versus* Richardson.

(5)

Co. 8. 68. a. 9. a.

1 Cr. 199.
Ante 159.
Co. 8. 69. a.

ERROR of a Judgment in the Exchequer : The Defendant pleaded an Excommunication, in disability of the Plaintiff, and shews it under the Seal of the Bishop : The Plaintiff pleads the general pardon of 3 Jac. which was subsequent to the Excommunication : And it was thereupon demurred, and made a doubt by the two Chief Justices, whether an Excommunication may be discharged by the Kings pardon ; and the Plaintiff be restored to his Suit without absolution and reconciliation to the Church.

Vaughan *versus* Ellis.

ERror of a Judgment in the Exchequer, in an action upon the Case for words, for calling him Bastard: The Error assigned was, That the Action lies not for these words, without special cause shewn that he was damnified by them; As to alledge, that he was inheritable to some Lands, and that by reason of those words, he is to have loss: And here it is shewn, that such Land was given in tail to his Grandfather; And that his father had divers Sons, whereof the Plaintiff is youngest Son, and his elder Brothers are living; And that one such was to buy the Land, and offered him such a sum of money for his Title; And by reason of those words refused to give him any thing; So it appears by his own shewing, that he hath not any present Title, and therefore no cause of Action at all. But the two Chief Justices conceived, that although he hath not any present Title, it appears he is by a possibility inheritable to those Lands; And being offered a sum of money for that possibility to joyn in the assurance, although he hath not any present Title to the Land, yet by reason of those words he had a present damage, and in futuro might receive prejudice thereby, in Case he were to claim any Land by descent. And for these causes, they held that the words were Actionable: Whereupon the Judgment was affirmed. (6)
Cr. 469.
Post. 324. 642.

Anonymus, Hill. 3 Jac. Rot. 616.

ERror of a Judgment in the Kings Bench: The Error assigned was; whereas the Plaintiff was non-suited in Trespass after evidence; The Judgment is, Quod nihil capiat per billam, which is a Bar; whereas it ought to have been only in misericordia quia non prosecutus est, &c. But it was held to be no Error; For all the Presidents of latter times are in that manner. Secondly, for that the Judgment is, Quod querens & Plegii sui sint in misericordia pro falso clamore suo, whereas it ought to have been, Quia non prosecuti sunt: For it ought not to be pro falso clamore, but where it is after Verdict or Judgment upon Demurrer: And for that vide Fitz. N. B. 76. a. the Book of Entries 176. And for this matter, it was held to be manifest Error, and the Judgment was reversed. (7)
Ante 211.
Co. 8. 61. b.

Buckingham *versus* Costendine.

ERror of a Judgment given against Buckingham: Whereas the Plaintiff declares in an Assumpsit; That the Defendant being indebted unto him in 40 s. In consideratione inde, assumed to pay, &c. And he shews not for what cause the debt was due; which (8)
Ante 207.

which was held to be ill ; For it might be by Obligation, or Recognition, or Lease, in which Cases such a general Declaration is not good. And of that opinion was all the Court ; And although there were divers presidents in the Court that way, (as it was said) yet they resolved it to be ill, without alledging that the debt was, by reason of ware sold, or upon loan, or for such like cause, so as it might appear to the Court, to be matter whereupon to ground an Assumpsit : wherefore for this Cause it was Reversed. Note, the like Judgment was in the Exchequer-Chamber between *Woodford and Deacon*, *quod vide ante*, fol. 206. &c. Where Judgment in an Action upon the Case was reversed for that Cause.

Sir Nicholas Poynts his Case.

(9) **E**ndicment upon the Statute of 8 H. 6. supposing, that such a day and year he entred with force and arms into such lands existent. liberum tenementum J. B. and with force him expelled and amoved : Exception was taken, because it was not alledged ad tunc existens ; For it may be, that at the time of the Endicment, it was the Freehold of J. B. but not at the time of the Entry : wherefore for this cause it was reversed. And in the same Term another Endicment against in the County of Dorset was discharged for that Cause.

Braddon *versus* Bowen.

(10) **I**nformation in the Exchequer upon the Statute of 5 Ed. 6. for engrossing of Apples, being dead Victual, the Defendant being a Coffermonger : And it was thereupon demurred, That it is out of the Statute, and is not such Victual as the Law intends : And it was adjudged accordingly, and Error thereof brought in the Exchequer-Chamber ; And upon conference, the two Chief Justices resolved, That it was not within the Statute : And Coke said, there was not any thing prohibited within the Statute, but it had a proviso, how in some kind it might be bought ; but there was not any such proviso for Apples, therefore it never was intended to be restrained : And for that cause the Judgment was affirmed.

Frank *versus* Alsop.

(11) **E**rror in the Exchequer-Chamber, of a Judgment given in the Kings Bench in an Action, for these words ; I will prove thee a Thief, and a plotter of Thievery ; And I will prove it by thine own Son, or else I will send him to the Devil : The Error assigned was, that an Action lies not for these words ; And all the Justices and Barons resolved, that the words were not Actionable : For it is not affirmed, that he was a Thief, but that he would prove him

him to be a Chief, which if false, there is not any Damages to the party: And saying, he would prove it by the Plaintiffs Son, or else he would send him to the Devil; That shews he was doubtful in his asserpation; And if one saith, I will prove such a one to be a Bankrupt, no Action lies: Wherefore Judgment was reversed.

Prichard *versus* Hawkins.

Action for these words; That Prichard that serves Mrs. Shelley, (and avers that he served Mrs. Shelly at the same time) hath murdered Adams his Child, Elizabeth Adams filiam Johannis Adams modo defuncti. innuendo; After Judgment for the Plaintiff in the Kings Bench, Error was thereof brought; And the Error assigned, because, as the Declaration is, there is not any certain or sufficient charge against the Defendant; For the words being, modo defuncti. extend only to the time of the Action, and not to the time of the words speaking, wherefore no ground of Action: And of that opinion were all the Judges and Barons: Whereupon it was reversed; And a president shewn, that for such cause between Baldero and It was adjudged in the Kings Bench that an Action lay not. (M) Post. 343.

Termino

Termino Hillarii,

Anno sexto JACOBI Regis in Banco Regis.

Sir Francis Leake *versus* Jane Eyre, Trin. 6 Jac. Rot. 3466.

(1)
2 Rol. 835.

Co. 11. 82. b.

IN Waste, upon Demurrer the Case was: One made a lease for years by Indenture of a House and Land, with Housebote and Haybote, sine impedimento vasti: The Defendant pleads this Lease in Bar: And it was thereupon demurred, and adjudged for the Defendant; For sine impedimento vasti, is all one with sine impetitione vasti; For the proper word is, impedimentum and impeditio, and impeditio is but a corruption: And that the words sine impedimento vasti, do extend not only to Housebote and Haybote (as some would have it) but to the entire sentence. Vide Cokes new Book of Entries, fol. 664.

Cumber *versus* Episcopum Chichester and Green
Incumbent, Trin. 6 Jac. Rot. 1629.

(2)
Oler 277. a.

Co. 7. 28. a.
3 Cr. 44.
Ante 54.

Co. 7. 28. a.
3 Cr. 44.

1 Cr. 592.
Hob. 127.

QUARE Impedit for the Church of South-Ease in Suffex: The Court held clearly, First, That if Title of Laple accrues to the King, and the Patron presents, yet the King may present at any time as long as that Presentee is Parson. But if the Presentee dies, or resigns before the King hath presented, the King hath now lost his Presentment. But if the resignation be by Covin, with an intent to take away the Kings Title, the King shall not lose it thereby, but shall have his Presentment. Secondly, That if the King hath Title by Laple, because a Parson hath taken a second Benefice; If the Parson dies, or resigns the first Benefice, and the Patron presents, whose Presentee resigns upon Covin, or dies, The King hath lost that Presentment; For Laple is but unica proxima vice: And so it was adjudged, Mich. 27 & 28 Eliz. Cornwalls Case. Thirdly, If in Quare impedit for the King, the King and party be at Issue, which is found against the King, and Title appears for the King by Nient dedire of the party; yet the Court shall not adjudge for the King. Otherwise it is, where the party confesseth the Kings Title.

Bul-

Bulbrooke *versus* Briggs.

Prohibition: The question was, Whether the Statute of 34 H. 8. gave remedy for a Pension in the Spiritual Court where it is not wilfully denied; Briggs libelling there for a Pension which was never demanded: And Bulbrooke prayed a Prohibition; which was denied, because originally this Suit appertains to the Spiritual Court. (3)
2 Rol. 300.
3 Cr. 675.
Post. 269. 666.

Fulliam *versus* Harris.

Dower: The Writ was, Præcipe A. quod reddat E. Fulliam rationabilem dotem suam *des terres*, &c. dudum B. Fulliam quondam viri sui, &c. Exception was taken to the Writ, because it was not in this manner: Præcipe A. quod reddat E. Fulliam quæ fuit uxor B. Fulliam, &c. For in the beginning of the Writ, she ought to be named uxor of her husband, &c. for that is the name whereby she claims her Dower: And she ought to be his lawful wife, otherwise she may not claim any Dower. And the Court held, that the writ was ill; and that the words in the writ, B. Fulliam quondam viri sui, &c. be not sufficient: Therefore day was given to the Plaintiff to shew cause why the writ should not abate. (4)
F.N.Br. 148.A.

Earl of Huntington *versus* Sir Anthony Mildmay.

Quare impedit; It was held per totam Curiam præter Walmsley, where the Grant of an Advowson was pleaded, after the Statute of 27 H. 8. to one, to the use of another in Tail; That *Cestuy que use* needs not shew the Deed of Grant, because the Deed belongs to the Grantee, and not to *Cestuy que use*; But yet he ought to shew, that it was granted by Deed. Vide Dyer 277. Escots Case. But Walmsley held, that in this case he ought to shew the Deed, because the Grant is not good without Deed; and so differs from Escots Case. Vide 22 H. 6. 1. 35 H. 6. 32. (5)
2 Rol. 31.
1 Cr. 242.
3 Cr. 357.

Game *versus* Symms & Mariam uxorem ejus.

Formedon in Remainder: The Case was such, Henry Winter was seised of Socage Land, and devised it to Steven Winter in Tail; Remainder to Anne the Sister of Stephen, &c. and died: Stephen entered, and levied a Fine with Warrant, and died without Issue: The said Anne and Elizabeth his Sisters, being his Heirs, the question was, whether Anne should be bound by this Warrant, for the whole, or for the moiety only. And Hutton Serjeant argued, that she should be bound for the whole; For the Warrant is collateral, which is the strongest, (6)
Co. 8. 51. 2.
Jf f and

and extinguisheth the Right, 19 H.6. 14 H. 7. 10, 11 Aff. pl. 35. Also Anne the Sister had all the Right of the Remainder, and therefore shall be bound for all, 12 H.7.3. 16 H.7. 13. Harris Serjeant to the contrary, That the warranty shall be divided, and bind but for a moiety, because both the Sisters are Heirs, and therefore the warranty goes to both: And it is not like the Case of Burrough-English or Gavelkind, 44 Ed. 4. 10. For true it is, warranty descends only upon the Heir at the Common Law. Walmley took a difference, where the party upon whom the warranty descends, is Heir, as the *Feme* in this Case is, and so shall be bound; and where he is not Heir, as in Burrough-English. And Coke observed a diversity; *lien real* descends only upon the Heir at the Common Law; But *lien personal* binds all, as Heirs in Gavelkind, &c. As if a man oblige himself and his Heirs in an obligation, &c. And he put this Case, If the Heir at the Common Law be vouched for warranty, who vouches the Heirs in Gavelkind, &c. because of the possession, they all shall vouch over; and what is recovered in value, shall go only to the Heirs in Gavelkind: So if two be vouched, where the one hath nothing, and they vouch over; the recovery in value goes only to him who had the Interest, &c. 32 Ed. 3. Garrants 94. And Judgment was given, that the warranty should bind all.

Lit. 2. 603.
Co. Lit. 379.b.
Hob. 25.
Co. Lit. 376.b.
Hob. 25.
Co. 2. 51. b.
Co. Lit. 373.b.

Beston versus Robinson.

- (7) **A**Udita querela by Beston, who was in execution upon a Statute-Merchant at the Suit of Robinson; and shews certain Articles betwixt him and Robinson, to discharge him of the Statute; and prays to be let at Mainprise: But the Court denied it; One in execution ought not to be let to Mainprise upon a surmise: And here the Articles which he shews, are not good to discharge him of the Execution; But his remedy is to have an Action of Covenant upon them.

Beedle versus Clerke.

- (8) **P**ARTITION: The Case was such; A. and B. were Joynt-tenants for years; B. suffers C. to occupy his moiety with him; and A. brings a writ of Partition against B. and C. supposing that B. had granted a moiety of his part to C. C. shews that he was but Tenant at will to B. whereupon the writ abated; whether A. might have another writ of Partition against B. by Journeys accompts, was the question: and resolved that he might; For the possession of C. was good colour for bringing the writ of Partition; and A. could not take notice what Estate C. had, &c.
- Co. 6. 10. a.

Anonymus.

NOte, An Infant was admitted by Guardian, to sue accompt (9)
against his Guardian in Socage, for the profits received, after
the Infant had accomplished his age of fourteen years: And the Acti- F.N.Br.118.b.
on was brought against him, as against his Bayliff. And so it ought
to be, as the Justices held.

Addis Case B. R.

ADdis having a Suit depending in this Court, coming to (10)
London, was committed to Newgate, &c. Hutton Serjeant
moved for an Habeas Corpus, which was granted; and the Gaoler
of Newgate made his return in this manner, (viz.) That
the said Addis was committed to his custody by Warrant from the
Lord Chancellor of England, for certain matters concerning the
King, there to remain until the Lord Chancellor delivered him;
and for that cause he could not have his body here. And Hutton
moved, that the Return was not good, being it is too general:
For it shews not for what causes he was committed; For it might
be for a cause which would not hinder him of his privilege. Here
also the Return is, That he ought to remain there until he were
delivered by the Lord Chancellor; Therefore he said it was ill.
And the Court thereto said, it was the first time that such Excepti-
ons had been taken: Therefore they would consider of the Case.
And 9 H. 6. 44. was cited, and 33 H. 6. 28. & 29. and 4 Ed. 4.
15. & 16. 1 Cr. 507. 552.
Ante 81.

Anonymus.

IT was doubted in the Star-Chamber, If Costs and Damages (11)
be recovered there of one for a Riot, whether his Executors
and Administrators shall be chargeable therewith: Walter said,
there were Presidents in this Court, that he should be charged;
and some of the Clerks affirmed so much. But the Lord Coke
held, they were not chargeable for a Riot; But if Damages or
Costs were given by any Statute; there, upon recovery in that
Court it shall be otherwise.

Termino Paschæ,

Anno septimo J A C O B I Regis in Banco Regis.

Goodwin *versus* Welsh and Over.

(1)
Yelv. 151.
11 Mod. 347.

Action of Trespass, for several things against the two Defendants, and declares to his damage, &c. The Attorney for the Defendants pleaded Non sum Informatus, and Judgment thereupon was given severally for the Plaintiff; And Writs to inquire of damages issued out, and were returned. It was now moved, that the Writs should not be filed, because the Plaintiff at the time of the inquiry, did not prove that they were his Goods, but proved only the value of them: And a difference was taken at the Bar betwixt an Action confessed, and a Non sum Informatus. For, the property of the Goods is also confessed in the first Case to be in the Plaintiff: But it is not so in the other; For there Judgment passeth without the Defendants pivity, and only for want of pleading, as in the Case of a Nihil dicit. But the Court held, that both Cases were alike; And that the Plaintiff is not bound to prove his property in either of them: Because the Writ commands that the value only be inquired of, and if the Plaintiff should be bound to prove his property, and fail thereof, it would be in destruction to the first Judgment, which cannot be: But it is otherwise where Not guilty is pleaded; For then the Trespass is denied, which must be proved, and tried by the Jury; And there in that Case both the value and property do come in Question.

Barret *versus* Fletcher.

(2)
Yelv. 152.

DEbt: Upon an Obligation of 500 l. conditioned to stand to the award of J. S. and T. D. So that &c. The Defendant pleaded, that the Arbitrators did not make any award: The Plaintiff replies, and shews the award, but assigns no breach: The Defendant rejoyns, that the award pleaded is not the Arbitrators

Arbitrators award; whereupon Issue being joyned, a Verdict was given for the Plaintiff: And it was moved in arrest of Judgment, because the Plaintiff in his Replication not having assigned any breach of the award, there was not cause of Action; For the Obligation is not for debt, but is guided by the condition, which is for the forbearance of a collateral thing: And the Court ought to be satisfied, that the Plaintiff had good cause of Action, otherwise they cannot give Judgment; For although a Verdict be given for the Plaintiff, yet this defect in the Replication is matter of substance, and is not helped by the Statute: And the Court being of that opinion, Judgment was stayed.

Ante 133.
Co. 8. 133. b.
Post. 312. 442.
640.
Hob. 198.
3 Cr. 899.

Bedel versus Lull.

Ejectione firmæ: Upon a Lease of Land made by Eliz. James: (3)
The Defendant pleaded, That before Eliz. had any thing; Yelv. 151.
One Martin James was thereof seised in Fee, and had issue Henry James, and died seised, and thereupon it descended to Henry James as Son and Heir; and that Eliz. entred, and was seised by Abatement, and made the Lease to the Plaintiff; and that the Defendant afterward, as Servant to Henry James, and by his command, &c. The Plaintiff by way of Replication, confesseth the seisin of Martin James, and that he being so seised, by his last Will in writing, devised the said Land to Eliz. in Fee, and afterwards died: By reason whereof she entred by force of the devise, and made the Lease to the Plaintiff, and traverseth Without that, that Eliz. was seised by Abatement in manner and form, &c. Upon this replication the Defendant demurred, and shewed for cause, That the Traverse was not good; And it was adjudged for the Defendant: Co. 6. 24. b.
For the Plaintiff by this Replication needed not both to confess 5 Cr. 278.
and avoid, and to traverse the Abatement; For the Plaintiff made a title to his Lease under Eliz. the Devise of Martin James, and so her Entry legal, and not by Abatement, as the Defendant supposeth: And then to take a traverse over makes the Replication vitious: For no traverse ought to be taken, but where the thing traversed is issuable; and the devise here is only the title issuable. It was also held, that the traverse was not good, as to the manner of it; For he should not have traversed Without that, that Eliz. was seised by Abatement: But it ought to have been Without that, that she did abate, &c. Ante 87.

Termino Trinitatis,

Anno septimo J A C O B I Regis in Banco Regis.

Tuthill *versus* Milton, Trin. 6 Jac. Rot. 1272.

(1)
Yelv. 158.

Post. 258. 579.
1 Cr. 282.
3 Cr. 273.
Ante 163.

1 Cr. 165.

Error: Of a Judgment in Bristow; In an Action for words; whereas the Plaintiff for five years before the first of May 3 Jac. was a Draper, and exercised the same Trade, That the Defendant, apud Wardam omnium Sanctorum in Bristow, spake these words of the Plaintiff, (viz.) Thou art a Bankrupt: The Defendant pleads Not guilty, and found against him, and Judgment for the Plaintiff. The first Error assigned, was, that this Action lay not; because it is not averred that upon the day of the speaking the Plaintiff was a Draper, but for five years before: Sed non allocatur; For it shall be intended, that he yet useth that Trade. Secondly, for that the Ven. fac. is awarded de Warda omnium Sanctorum, and not from any Parish: Sed non allocatur; For so is the common course in many Counties, and they use not to name any Parish: And there a Ward is put for a Parish. Thirdly, that a Capias is awarded in this Action for the second process, whereas a Capias lay not in this Action, until the Statute of 19 Hen. 7. which extends only to those in Westminster, and not to Corporate Mills: Sed non allocatur; For it may well be by custom in those Mills: Wherefore the Judgment was affirmed.

Belcher and his Wife *versus* Hudson, Hill. 6 Jac. Rot. 132.

(2)
Yelv. 156.
1 Rol. 343.
2 Rol. 407.

Post. 571.
Ante 170.
Hob. 216.

A Sumpsit: For that the Defendant assumed to the Feme of the Plaintiff in her widowhood, That if she would marry Thomas Mason, he would pay unto her annually after the death of the said Mason, during her life 40 s. And alledges in fact that the married Thomas Mason, and after his death married the Plaintiff; and for Non-payment of 40 s. annually after his death brought the Action: The Defendant pleads a Release from Thomas Mason of all actions and demands which he had, or, &c. And it was thereupon demurred, and after argument at the Bar adjudged to be no plea; For being a promise to perform a payment after the death of Thomas Mason, it was not in demand during his life, nor by any possibility could ever be demanded by him: Wherefore, &c.

Tracy

Tracy *versus* Veal, Hill. 6 Jac. Rot.

Action upon the Case for deceit : whereas Bernard Welles (3)
 was the Plaintiffs servant in Comit. Derby, and had 65 l.
 of the Plaintiffs in his custody ; That the Defendant, to deceive
 the Plaintiff of the said 65 l. quendam literam in the name of the
 Plaintiff procured to be written, and directed it to the Plaintiffs
 said servant, and counterfeited the name of the Plaintiff thereto,
 and sealed it quasi with the said Plaintiffs Seal, and caused it to
 be delivered to the said Bernard Welles, affirming it to be the
 Plaintiffs Letter, and that he was sent therewith unto him by the
 Plaintiff ; whereupon he caused the same to be read, and upon
 reading thereof understanding quod in eadem litera continebatur,
 That the Plaintiff had appointed the said Bernard to pay and de-
 liver to the Defendant the said 65 l. to the use of one Thomas Bart-
 let, to whom it was supposed by the said Letter that he was in-
 debted ; and affirmed, that he was Servant unto the said Thomas
 Bartlet, and that he was to receive the said 65 l. for his Master :
 By reason whereof, the said Bernard giving credit unto him, payed
 and delivered unto him the money ; ubi revera, the Letter was
 counterfeited, and he never sent the Defendant, nor was indebted
 in any such Sum, &c. The Defendant pleads Not guilty, and
 found against him, to his damage of 105 l. And it was thereupon
 moved in arrest of Judgment, first, that this supposition quendam
 literam scribi fecit, where it ought to be literas (for it is not possible
 that one Letter might comprehend it) was not good. Secondly,
 that this Action lies for the Servant, and not for the Master. Third-
 ly, that it was not shewn what was contained in the Letter ; For
 it is only, that the said Servant intelligebat what was therein writ-
 ten, and that might be his misconstruction. But all the Court af-
 ter several motions held it to be well enough ; For the deceit and
 abuse is to the Master, and the loss only to him ; wherefore the
 action well lies for him : Also although it is not precisely set down
 what was in the Letter, but that intelligebat such matter was
 contained therein, which is uncertain ; yet because the deceit is al-
 leged to be in the delivery of the counterfeited Letter, and affirming,
 that he was Servant of Thomas Bartlet, and sent by the Plaintiff
 to receive such a Sum, as due by him to the said Thomas Bartlet
 (all which was false, and all which being deceit) upon the whole
 matter the Action well lies ; and was adjudged for the Plaintiff.
 And afterward a writ of Error being thereof brought, and all these
 matters assigned for Error, the Judgment notwithstanding was
 affirmed.

3 Cr. 794.

Richard Beedle *versus* Morris Inn-Keeper of Dunchurch, Trin. 7 Jac. Rot. 1535.

(4)
Yelv. 162.

1 Cr. 38. 336.

Ante 224.

Post. 348.

Action upon the Case : And declares upon the Common Custom of the Realm, That in Common Inns, the Inn-Keepers ought to keep the goods of their Guests safely, and all other goods brought into their Inns, under their Custody, without subtraction : That one William Beedle, servant to the Plaintiff, was lodged at the Defendants house in Dunchurch; And that he having there a Bag, with 60 l. in money of the Plaintiffs therein, quidam malefactores to the Plaintiff unknown, the said bag of money, in the said Inn being, in default of the Defendant and his servants took and carried away. The Defendant pleads Not guilty, and found against him : And it was moved in arrest of Judgment, and after assigned for Error, that the Action ought to have been brought by the servant, and not by the Master : For the Custom of the Realm is only for Travellers, and here the Master was not a Traveller. But it was adjudged, that the Master might well have the Action ; and that so it had been resolved before these times. Secondly, it was moved, that this Custom was not well alledged ; For there is not any such Custom, That bona & Catalla aliquorum aliorum subditorum, &c. should be safely kept, unless they were Guests : Sed non allocatur ; For the Custom is sufficiently alledged to maintain the Action. Thirdly, it was assigned for Error, that the Judgment was not well entred ; For it ought to have been quod capiatur, and not in misericordia, according to the Presidents, Hill. 9 H. 7. Rot. 310. the old Book of Entries 377. which is a Capias ; For this Action compriseth in it self a contempt contra legem, &c. Sed non allocatur ; For it is not any such contempt for which the King shall have any Fine, as it is in Actions which are contra pacem : Wherefore it was adjudged for the Plaintiff ; and this Judgment was affirmed in the Erchequer Chamber. See this Case reported with these reasons Cokes new Book of Entries fol. 347.

Taylor *versus* Markham.

(5)
Yelv. 157.

In an Action of Trespass and Battery ; The Defendant pleaded, that he, at the time of, &c. was seized of the Rectory of D. in Fee ; And that at the same time and place where the Trespass and Battery were supposed, &c. Corn was severed from the nine parts : And for that the Plaintiff would have carried away his Corn, the Defendant there stood in defence thereof, and kept the Plaintiff from carrying it away ; So as the harm

harm which the Plaintiff received was of his own wrong, &c. The Plaintiff replies, that the Trespass and Battery were done *Sans tiel cause* alledge, &c. Whereupon the Defendant demurred in Law; And it was adjudged for the Plaintiff: For it is not requisite in this Case for the Plaintiff to answer the Defendants Title, because he doth not by this Action claim any thing in the Land or Corn, but only Damages for the Battery; which is Collateral to the Title. And therefore the general Replication is good. Ante 164. Ca. 8. 67. a. But when the Plaintiff makes a Title in his Declaration to any thing, and the Defendant pleads another thing against it, the Plaintiff must reply specially, and not say *Sans tiel cause*, as it is in 14 H. 4. & 16 Ed. 4.

G g

Termino

Termino Michaelis,

Anno septimo J A C O B I Regis in Banco Regis.

Underhill *versus* Kelsey, Trin. 7 Jac. Rot. 1274

(1)
Co. 8. 99. 2.

Ejectione firmæ: Upon Demurrer (the Defendant claiming by Lease from William Copley) the Case appeared to be; Thomas Copley, Father of William, was Cophholder in Fee of the Mannor of Shellwood; wherein a Custom was pleaded, that upon the death of every Cophholder, his Heirs should pay such a Fine as should be reasonably assessed: And another Custom, that if a Cophholder died, and his Heir cometh not the next Court to be admitted, proclamation shall be made: And if after three proclamations, the Heir comes not in, the Lord shall seise it as forfeited; And shews, that 27 Eliz. Thomas Copley died, and his death was presented, and that William was his Heir, and thereupon proclamation made, &c. And afterward at two other Courts 29 Eliz. proclamation made; and for not coming, the Lord seised, and let to the Defendant. The Plaintiff shews, that William Copley at the time of the death of his Ancestor, and at the time of the proclamations made, was beyond the Seas, and so continued until 4 Jac. at which time he returned; and having notice of the death of his Ancestor, tended his Fine, and entred, and let to the Plaintiff; whereupon it was demurred: The sole question was, whether his being beyond the Seas should excuse him of the forfeiture. After argument at the Bar, the same day the Court delivered their opinion: and Williams, Yelverton, Fennor and Fleming, held, That it was not any forfeiture against the Heir; For he being beyond the Seas, shall not be intended to have consulance of that descent unto him, nor of the proclamations; and therefore is excusable as well as if being over the Sea, he shall be excused from Outlawry, from a Descent which takes away his entry, and from a non-claim upon a fine by the Common Law. For, as Williams said, he being beyond seas, it is not in his power to return when he will, and the Law will not compel him to impossibilities; and the Lord is not at any mischief, but may seise in the interim, and take the mean profits, and shall not be responsible for them. And Fleming said, the custom were unreasonable, if it should bind persons beyond Seas; therefore the Law makes an exception thereof: And for these reasons they held, That the Plaintiff should recover. But Croke *pushey* Justice held the con-

Ante 101.
Co. 8. 100. 2.

Littlet L. 440.

contrary; For it is quasi a Condition annexed to his Estate, that he should pay his Fine after proclamation; which not being paid, his absence beyond Sea shall not excuse him, no more than if a Feoffment had been upon condition, that the Heir should pay 20 l. within a year after the death of his Father; although the Father dies, his Heir being beyond Sea, if he pays it not within the year, the Condition is broken, and his being beyond Sea shall not excuse him. True it is, that impotentia and impossibilitas in some cases may excuse, but here there is not any such; For he might by Letter of Attorney pray to be admitted: And although it be a mischief to the Heir, yet it is a greater inconvenience to the Lord, that he by that means should not have his services during all that time: Also there doth not any cause of his absence appear, as in service of the King, or the like, which peradventure might make a difference: Wherefore, &c. But notwithstanding, by the opinion of the four Justices, Judgment was then forthwith given, because the Lease was determined the same day; And Execution awarded *Maintenant*. Vide *Plow.* 372. Littlet. 440.

Dutton versus Gervase Molineux.

IN an Audita querela, the question was; Whether a Purchaser after an Extent sued, and the Land delivered, could have an Audita querela; For none shall have it but the party grieved; And the Extent being before his time, he therefore should not have it: And of that opinion was Fleming Chief Justice; who said, that he was in Counsel in a Case depending in Chancery, and there it was much debated and argued before the Judges, (to whom the point in Law was referred) whether a Feoffee might have an Audita querela upon an Extent made before his time: And the better opinion was, that he could not: But there was not any resolution, it being ended by Compromise. Wherefore the rest of the Judges being doubtful, the Audita querela was allowed de bene esse; and appointed that there should be a Demurrer thereupon. (2)

Barwick versus Foster, Hill. 5 Jac. Rot.

DEbt upon a Lease for years; And declares upon a Lease for twenty years by Indenture, rendering 40 l. per annum at the two usual feasts, (viz.) at Michaelmas and our Lady-day, or within ten days after every feast: And because 8 l. for the Rent of the two last years, ending at Michaelmas last past, was behind and yet unpaid, he brought the Action: And upon Non debet pleaded, it was found for the Plaintiff; And moved in arrest of Judgment, that the Declaration was ill; For he demands Rent as due at Michaelmas last, where it was not due (3)
Yelv. 167.

Post. 310.
Co. 10. 127.b.

Post. 310. 311.

Co. 10. 128. a.

Post. 310.

Post. 310.

at all until the ten days determined : And as this Case was, the lease ended upon Mich. day ; So there could not be ten day after Mich. during the Term, and thereby the Rent should be lost : And of that opinion was Williams ; For there is not any Rent due until the end of the tenth day, and there is not any tenth day at the end of the Term ; Therefore it is lost. Fleming, if Lessor for life makes a lease years, rendering Rent at Mich. and the Annunc. or within ten days after every of the said Feasts ; If he dies after Mich. before the ten days be expired, It was resolved, that the Rent was lost : For it was not due until the tenth day, and before that time he died. Also if a man reserves Rent in such manner, and dies after Mich. and before the tenth day ; This Rent shall go the Heir, and not to the Executor : And if a Lessor, after Mich. and before the tenth day, grants the Reversion, the Grantee shall have the Rent, and not the Grantor : Whereby appears, it is not due until the tenth day : So, to demand it at Mich. it is not at the day when by the Law it is payable : Therefore the Declaration is not good. Croke Justice, to the contrary ; For the Rent is reserved, payable annually during the Term, at Mich. and the Annunc. or within ten days ; So it is at the Election of the Lessor to pay it at Mich. or at the tenth day after : And although always during the term, the Lessor shall not be enforced to pay it until the tenth day, and it is not demandable until that time, (For the Lessor hath election to pay it upon either of the days) nevertheless the Lessee may tender it at the Feast, and the Lessor is bound to accept thereof ; which proves, that it is then due : yet at the last Feast of the Term, (because there be no more ten days after) for the necessity in Law, it is due and payable at the Feast, otherwise it never should be due ; Therefore the demand thereof, as due at Mich. is well enough. Yelverton delivered not any opinion ; Fennor agreed with the other two : Et Adjournatur. Vide postea pag. 233.

Bradley *versus* Toder.

(4)
Yelv. 168,
3 Cr. 64.

A Sumplisit : In consideration he would marry such a one, his Cousin, that she would give him a 100 l. And alledges in fact, that he married her such a day and place ; and although he requested the Defendant such a day and place to pay, yet he had not payed. Upon Non assumpsit pleaded, and found for the Plaintiff, it was moved in arrested of Judgment ; That the Declaration was not good ; Because it is not alledged, that he gave notice of his marriage : And of that opinion, upon the first motion, was the whole Court ; For a precise notice of the marriage ought to be given : And although it is alledged, that he married the Feme, and afterwards at such a day requested the money, (which implies the notice alledged) yet it is not good in a Declaration,

claration, which ought to be certain, and is not to be maintained by intendment: But afterwards being moved again upon a precedent shewn, between Morley and Hodges, in the Exchequer-Chamber, where in this Court in the like Action verbatim (and no notice alledged) Judgment was affirmed; The Court resolved, that it was good enough: For it is a necessary intendment: That when after marriage he requested the payment of the money, that notice was given of the marriage: Wherefore it was adjudged for the Plaintiff.

1 Cr. 35.
Ante 102. 183.

Patrickson *versus* Barton.

T Respals: The Defendant Justifies; For that J. S. was seised in fee, and let to B. for years; And he, as servant to B. Justifies the *Damage feasant*: And it was thereupon demurred, because he gives not any colour; and after argument, adjudged, That for this cause the plea was not good, it being shewn for Cause of Demurret, otherwise not; for it is but form. And a difference was taken where the Defendant Justifies as servant to another, whose Freehold it is, without shewing any Title, and where he shews a Title, as in this Case is done. Vide 2 Ed. 4. & 10 H. 8.

(5)

Co. 10. 89. b.

Haywarth *versus* David.

A Executor brings Debt upon an Obligation: The Defendant pleads *Non est factum*, and found for him; And now the question was, whether the Plaintiff should pay costs upon the New Statute of 4 Jac. which enacts, that in every Action where the Verdict passeth for the Defendant, the Plaintiff should pay costs: But it was resolved, That this case was not within the intent of the Statute, he suing in anothers right, and of matter which lay not in his Conscience; therefore the Law never intended to give costs against him. And so it is upon the Statute of 8 Eliz. where costs be given in case the Plaintiff is non-suited; As it was ruled in one Fords Case; And so it was ruled here. And although Manne said, costs had been allowed in the like cases; they appointed that henceforward it should no more be so.

(6)
Yelv. 158.

1 Cr. 29. 219.
Post. 362.
3 Cr. 503.
Post. 350.
3 Cr. 69.

Sir Jerome Horsey *versus* Hagberton.

T Respals upon Demurret: The question was, Whether a Commoner may cast down and fill up Coney-Burrowes which were made in the common waste where he was to have Common: And this being pleaded in Justification, and Demurret thereupon; It was resolved and adjudged without argument, that the Commoner had not any other interest then

(7)

Ante 195.

to take the Common by the feeding there of his Cattel, and may not destroy the Conies nor Coney-Burrowes: Wherefore without argument, it was adjudged that the Plea was not good.

Bell versus Fox and Gamble.

(8)
Yelv. 161.
1 Cr. 315, 316.

1 Cr. 286.

1 Cr. 419.
Ante 131.

Conspiracy; For that they falsly procured him to be Endicted of such a Felony, Et in prisona detineri, quousq; before such Justices legitimo modo fuit acquietatus. The Defendant pleaded Not guilty, and found against them; And it was moved in Arrest of Judgment, because it is not alledged, quod fuit inde acquietatus, for here it doth not appear of what thing he was acquitted: And for this purpose the Case between Prickett and Stiles was cited, where it was adjudged, that the Declaration was ill: And the Court here was of the same opinion upon the first motion; But afterwards upon another motion, and view of the Writs in the Register and in Nat. Bre. where in some of the writs this word Inde is omitted; The Court held it to be well enough: For it cannot be intended, when it is alledged, That he procured him to be falsly Endicted, and to be detained in Prison quousq; he was acquitted, That he should be acquitted of any other matter but of that whereof he was Endicted; and thereby such a necessary intendment may well be maintained: Wherefore they would advise.

Poynts his Case.

(9) **E**rror, to Reverse a Fine, brought by Robert Poynts Son and Heir of Sir John Poynts, levied by him and his Father, he being within age: The writ was brought in Trin. Term Returnable quind. Trinit. And the Error assigned; For that he was within the age of 21 years at the time of the Fine levied, and yet is; But because he had not proofs ready to inspect his age, he was continued without inspection until Octab. Mich. And at the same day propter pestem in London & locis vicinis, the Term was to be adjourned until Mensē Mich. But in regard he was to accomplish his age of 21 years upon the 18. of Octob. the same month, which was before the time of the adjournment, he came at the first day, when Justice Croke came to Adjourn, having the Kings Writ of Adjournment of the Term, and played in the Case of necessity, before the Writ of Adjournment should be read, that he would inspect him, and (having his proofs ready to testify his nonage) to examine them, and adjudge his age: Whereupon, he (at his prayer) inspected him, and examined the witnesses (which he caused to be entred) and found him within age; But in respect he only was there, and doubted also whether it might be done upon that day, having the Writ of Adjournment,

jourment, he caused a Rule to be entred of this matter, with a Curia advisare vult; And then the Writ of Adjournment was read: And afterwards in full Term, all this matter being shewn, and the necessity of the case, it was prayed that the inspection of his age might be adjudged to be entred upon the first day, when the Term was adjourned; or upon the last term, when the Writ was retinued: And hereupon the Court much doubted what should be done; For it was a great mischief to the party, if it should not be allowed: And it was doubted, whether any thing could be done the day of the Adjournment. Whereupon they appointed that all this matter of proceeding should be entred in the Roll secundum veritatem facti; and then they would confer with all the Justices in England about it. But afterward the Conulse made a composition, and gave 400 l. for composition, and had release of Errors. Vide 4 Ed. 20. Note, afterwards *Fleming* said, that upon conference with the Justices, it was resolved, that this inspection was good, notwithstanding the Adjournment.

1 Cr. 12.
Ante 59.
Moor 189.

1 Cr. 12.
Post. 446.

Some *versus* Barwish.

Action upon the Case for a Nuisance erected; It was resolved per totam Curiam, where a Nuisance is made to the Land of two Tenants in common, that they shall joyn in the Action; For it is personal, and concerns the profits of the Land; And as they shall joyn in Trespasse, so they shall joyn in this Action: But in forging of false Deeds they shall sever; for that concerns the inheritance of the Land. It was also held, that for a Nuisance erected in the time of the Devisor, and continued afterwards (as this Case was) the Devisee shall joyn in the Action; For the continuance thereof is as the new erecting of such a Nuisance.

(10)
Yelv. 161.

Co. Lit. 198. a.

Co. 5. 101. a.

Yelv. 144.

Gyer *versus* Ormsted.

Action for words; For that he spake of the Plaintiff, hæc verba, He is a Thief, and hath stoln my Pear-trees. Upon Not guilty pleaded, and found for the Plaintiff, it was moved in arrest of Judgment, that the Action lay not; For it is not alleged, that there was any speech of the Plaintiff, nor innuendo the Plaintiff: Sed non allocatur; For de querente is good enough, and implies it: Also, that the words are actionable, being in the copulative; But if it had been, for he hath stoln, it should be otherwise: Wherefore it was adjudged for the Plaintiff.

(11)
Hob. 331.

1 Cr. 92.
Post. 444. 231.
Ante 158.
Ante 114.
Hob. 331.

Elve versus Sabe.

(72)
a Rol. 394. 5.

Ante 188.

DEbt upon an Obligation: The condition was, If such Lands be proved to be parcel of the Mannor of D. if then the Plaintiff may enjoy them without interruption of the Defendant; That then, &c. The Defendant pleads that they were not proved to be parcel of the Mannor: And it was thereupon demurred; For he ought to have pleaded, that they were not parcel of the Mannor, so as proof thereof might have been made in that Action; And of that opinion was the whole Court: Wherefore it was adjudged for the Plaintiff. Vide 10 Ed. 4. 11. 11 Ric. 2. Tit. Bar. Co. Rep. Gregories Case, lib. 6. fol. 21. a.

Termino

Termino Hillarii,

Anno septimo J A C O B I Regis in Banco Regis.

B Arwick *versus* Foster, quod vide ante pag. 227. it was now moved again the first day of this Term : And Fleming, (1) Yelv. 167. Yelverton and Croke, held, that the Rent was due : But Fleming doubted of the manner of the Action ; For he ought to declare, that it was not paid the tenth day. But Yelverton and Croke held, it was supplied by the words, adhuc a retro existit : Also, that in this case the Rent is due at every Michaelmas, Post. 310i and the Lessee might tender it to the person of the Lessor, who is bound to accept thereof ; But he hath election whether he will pay it until the tenth day be determined : And if the Lessor release unto him all Actions and Rents due after Michaelmas, before the tenth day, this Rent is released, and the Lessee hath only election for his ease and benefit. Post. 310s But Williams continued his former opinion, and Fenner inclined thereunto ; wherefore they would further advise. Note, that a president was here shewn, *Trin. 34 Eliz. Rot. 646.* betwixt Clerke and Bovenden, Debt for Rent, and declares upon a Lease made, rendering Rent at Michaelmas and the Annunciation, or within twelve days after every of the said Feasts ; and demands the Rent due at Michaelmas last past, and mentions not the twelfth day after ; and the Plaintiff had Judgment : And it was then said, that the reservation being *durante termino* at Michaelmas, or within ten days, this election is determined at the last Feast, because the Term is expired.

Proctor *versus* Johnson, Hill. 6 Jac. Rot. 700.

E Rror of a Judgment in the Common Bench, where the Case was ; Two Joynt-tenants for years of a Mill, the one grants (2) Yelv. 175. all his Estate, and dies ; the other (reciting the Lease and death of his Companion, and that he had all by survivorship, as he conceived) grants molendinum prædictum to the Plaintiff, and all his Estate therein ; And covenants, that he shall quietly enjoy it without any act by him, &c. And he was obliged for the performance of the Covenants, Articles and Agréments in the said Indenture ; And Debt was brought upon this Obligation : The breach assigned was, That the other had granted the moiety ;

h b

to

Ante 73.
Co. 4. 80. b.

so that he could not enjoy the whole Mill : And hereupon it was demurred, and adjudged for the then Plaintiff; and Error brought, and assigned in matter of Law : For although the word Grant implies a general Warranty, yet the last clause of the Covenant, being to enjoy it, &c. Without any Act by him, &c. expounds the first. But all the Court upon the first motion conceived, That the breach was well assigned ; For he, reciting that he had the whole Estate, and granting molendinum prædictum, it must be understood and intended to be the entire Mill, which is the grant and agreement to which the Obligation refers ; and the last clause cannot qualify it : Wherefore, &c. But it was adjourned.

Starkey *versus* Berton, Trin. 7 Jac. Rot.

(3)
Yelv. 172.

3 Cr. 179.

Prohibition: The Case was ; Two Churchwardens sue in the Spiritual Court, for a levy towards the reparation of their Church ; and had a sentence to recover, and costs assessed ; The one releaseth, the other sues for the costs, and there this release was pleaded and disallowed ; whereupon he prays a Prohibition, and all this matter was disclosed in the Prohibition ; and the Defendant thereupon demurred in Law ; and now moved, that this release by the one, being in the personalty, should discharge the entire. But it was resolved by all the Court to the contrary ; For Churchwardens have nothing but to the use of their Parish, and therefore the Corporation consists in the Churchwardens ; and the one solely cannot release, nor give away the Goods of the Church ; and the Costs are in the same nature, which the one without the other cannot discharge. Vide 11 H. 4. 2. 37 H. 6. 30. 8 Ed. 4. 6. And of that opinion was all the Court here : wherefore it was adjudged for the Defendant.

Dalby *versus* Cooke, Mich. 7 Jac. Rot.

(4)
Yelv. 171.
Ante 69.

Assumpsit : Supposing that such a day 4 Jac. upon an account betwixt them, the Defendant was found in arrears in such a sum, and assumed to pay, &c. The Defendant pleads, That such a day 4 Jac. they accounted, and then he was found in arrears such a sum as the Plaintiff supposed : And that the same day he made an Obligation for the payment thereof ; and traverseth, that at any other day, after the Obligation made, they accounted together, prout, &c. And it was thereupon demurred ; For that the account (which is cause of the Assumpsit) is not traversable, nor the time ; For it is but an inducement and conveyance to the Action. But the Court held, That the account which was the ground of the promise was well traversable : wherefore it was adjudged for the Defendant.

Memorandum,

Memorandum, This Term Edward Bromley, one of the Benchers of the Inner-Temple was elected, and made a Serjeant, by Writ directed unto him the Vacation before; And the next day after was made one of the Barons of the Exchequer. (5)

Weston *versus* Dyke, Trin. 7 Jac. Rot. 1141.

Assumpsit: Whereas the Plaintiff 20. April 6 Jac. bought of the Defendant a parcel of Gum, containing 28 hundred weight, at the rate of 3 l. 8 s. the hundred weight, which was good and Merchandiseable; And had satisfied the Defendant for it in Linnen, called white Holland, at the rate of 1 s. 4 d. the Ell; And whereas the same day there was a Communication betwixt the Plaintiff and Defendant, concerning another parcel of Gum of the Defendants, which he affirmed to be upon the Sea, and was to come to London in May following, and which he affirmed was as good as the other, which the Plaintiff had bought; And the Plaintiff thereupon promised to the Defendant, That if the said parcel of Gum did not exceed twenty hundred weight, he would within four months after the delivery of the said parcel of Gum, to Nathaniel, (Brother of the Plaintiff) deliver unto the Defendant so much Holland, according to the said rate of 16 d. the Ell, as the said Gum should amount unto, after the rate of 3 l. 8 s. the hundred weight: That the Defendant in consideratione inde assumed to the said Nathaniel, (the Plaintiffs Brother) the said parcel of Gum, when it should come to the Port of London, so as it exceeded not twenty hundred weight, and should be as good as the first was: And alledged in fact, That the Defendant not regarding his promise, the 31. May 6 Jac. delivered to the said Nath. to the use of the Plaintiff eight Bags of Gum, containing eighteen hundred weight, of ill and not Merchandiseable Gum, nor so good as the former; although the Plaintiff had delivered unto him so much of the quantity of Cloth, according to the rate aforesaid, in satisfaction thereof, &c. Wherefore, &c. The Defendant pleaded Non assumpsit, and found against him, and Judgment for the Plaintiff: And now Error thereof brought in the Exchequer Chamber, and assigned that this Declaration was not good, because it is not averred that the parcel of Gum which he delivered, was the same Gum which was upon the Sea, nor that this quantity came to the Port of London, nor that it did not exceed 20 hundred weight; for if it were another parcel of Gum, it were not within this promise: And although it were ill, and not Merchandiseable, That is not material, it not being within the promise, and it was his folly to accept thereof; and it shall not be aided by any intentment. And of that opinion were all the Judges and Barons: wherefore it was reversed. (6)

Molineux *versus* Molineux.(7)
Yelv. 169.

Ante 211.

ERror of a Judgment given in the Common Bench, in an Action of Debt brought upon an Obligation, against Molineux, as Heir to his Father: The Defendant pleaded *Riens per descent* but fifteen Acres in D. in comitat. C. the Plaintiff replies, that the Defendant had more Lands by descent, viz. fifteen Acres in S. whereupon they were at Issue, and found for the Defendant, That he had nothing by descent in S. So the Plaintiff had Judgment to have execution of the fifteen Acres in D. upon which Judgment the Defendant brought his Writ of Error; And assigned for Error a discontinuance in the Record of the Plea from Easter Term to Mich. Term following: And whether this were holpen by the Statute of 18 Eliz. being after Verdict, was the question. And it was adjudged to be Error, and out of the Statute; because the Judgment was not grounded upon the Verdict, but upon the Defendants confession of Assets only; And the Verdict was only to make the Defendants confession the stronger: And the Statute of 18 Eliz. is to be intended; when the trial by verdict is the occasion and cause of the Judgment: And the Judgment was reversed.

Lee *versus* Atkinson and Brooks.(8)
Yelv. 172.

Action of Battery brought in London; for assaulting the Plaintiff in such a Parish and Ward, and for beating, wounding, and evil intreating him, to his damage of 1000 l. The Defendants, as to the force and arms, pleaded Not guilty; Et quoad residuum, Atkinson pleaded, That at the time wherein, &c. At Gravesend in the County of Kent, he was possessed of a Gelding; and that the Plaintiff then came unto him to hire the Gelding for 4 s. for two days to ride from Gravesend to Netlebed in the same County, and from thence back to Gravesend in that time; And that the Defendant Atkinson for the consideration aforesaid, at the same time lent the Gelding to the Plaintiff, who took and rode upon him for the space of a mile towards Netlebed aforesaid; And intending to deceive the Defendant of the said Gelding, went out of his way to B. and rode towards London, by reason whereof Atkinson in his own right, and the other Defendant as his Servant, came to the Plaintiff, and required him to deliver the Gelding; which he refusing to do, Atkinson in his own right, and Brooks as his servant, and by his command, to repossess himself of the Gelding, laid hands upon the Plaintiff and took him from horse-back, and would have taken the Gelding from him; which occasioned the Plaintiff by force and arms to assault the Defendant, and by strong hands to keep the Gelding: whereupon the Defendant did maintain his possession

possession of him against the Plaintiff, as it lawful was for him to do ; And if any damage hapned thereby unto him, it was *de son tort demesne*. And traverfeth, That he was Not guilty in London or any where else out of Kent, &c. whereupon the Plaintiff demurred, and it was adjudged for the Plaintiff: For the battery is confessed, and that it arofe from the misbehaviour of the Defendants ; For their Plea in Bar faith, that the Plaintiff had hired the Gelding for two days, and that they in that time difturbed the Plaintiff of his poffeffion of the faid Horfe, and thruft him off his back, which was not lawful for them to do : For whatever the intent of the Plaintiff was either of cozening the Defendant Atkinson of his Gelding, or of riding him to any other place than was agreed upon, The Defendants cannot juftifie the feifing and taking away the Gelding from the Plaintiff within the time for which he hired him ; For during that, he had a fpecial property in him againft all men ; And in Cafe the Plaintiff had mifufed the faid Horfe, the Defendant Atkinson might have brought his Action of the Cafe againft him.

Termine

Termino Paschæ,

Anno octavo JACOBI Regis in Banco Regis.

The Lord Rich *versus* Richard Frank, Administrator of
Thomas Frank, Hill. 7 Jac. Rot.

(1)
1 Rol. 603.

1 Cr. 225.
Co. lib. 5. 31.
Post. 411. 546.
3 Cr. 712.

DEbt for 5 l. 1 s. 3 d. Rent, Quas ei debet & injuste detinet, upon a Lease made to the Intestate of the Mannor of Hatfield Broad-oke; and supposing the Rent to be due after the death of the Intestate. The Defendant pleaded Non debet, and found against him: And it was now moved in arrest of Judgment, That this Action ought to have been brought in the detinet, and not in the debet and detinet, because he is charged as Executor, and not for his own Debt: But it was adjudged, that the Action was well brought.

Broxholme *versus* Sir John Thorold.

(2)
Yelv. 177.

REplevin: The Defendant avows for damage feasant, as in his Fræhold in Coringam: The Plaintiff shews, that he is seised of a Messuage and fourteen Acres of Land; And that he and all those whose Estate it was, &c. have had Common in the place where, &c. all times of the year, tanquam eid. Messuagio & terr. spectant. And issue thereupon, and found for the Plaintiff; And now moved in arrest of Judgment, that this Bar to the Abowry was not good, because he doth not shew in what Mill the Messuage and Land is whereto he claims the Common: And of that opinion was the whole Court. And although it be after Verdict, yet it is a Jeofaile: And it was ordered that the party should replead.

Watson *versus* Thorpe and his Wife.

In Battery: The Baron justifies; For that the Plaintiff assaulted his Feme, In aid of whom, &c. The Feme by her self pleads and justifies *De son assault demesne*; The Plaintiff saith, *de injuria sua propria, absque tali causa*; And both Issues found for the Plaintiff, and damages entirely given: And now alledged in arrest of Judgment, That the Trial was ill; For the Feme by her self cannot plead; and the damages being intirely assessed, all was ill: And of that opinion was the Court; and awarded that they should replead. (3)

1 Cr. 594. 417.
Ante 6.
Post. 288.

Cunningham *versus* Hugonem Hare, in the Exchequer Chamber.

Error of a Judgment in Banco Regis; Where in Debt upon an Obligation, the Condition was, If such a one appeared in the Kings Bench the next Term following, and put in good Bail, at the suit of the said Hugh Hare: That then, &c. He pleads, that the Term was adjourned to the Castle of Hartford; and that he there put in good Bail: The Issue was, that he did not put in good Bail; and found for the Plaintiff, and Judgment for him; And now Error assigned, because the Ven. fac. was *de vicineto de Hartford*, where it ought to have been *de castro de Hartford*: which was held to be a manifest Error by all the Judges and Barons; For *Castrum Hartford* is a distinct name of a place, as *Manerium de D.* And it is not like to what was objected, that where a thing is alledged to be done at the Capital Mesuage of D. there the Venue shall be of D. For that is intended to be all one with the Bill: But *Castrum Hartford* is intended a distinct place by it self; And so it was said were all the presidents, where things are alledged to be done *apud castrum Ebor. apud castrum Norwic.* There the Venues are *de castro.* Another Error assigned was, because it appears upon the Record, That the Verdict was given by 13 Jurors, and was so entred in the Record: But because it was only the Entry of the Clerk of the Assise, and by the Writ of *Distringas* (which is the Warrant of the Record, and wherein all the Jurors are sworn,) It appears that twelve only were sworn; The other being but a mispision, It was awarded to be amended: And it was here held, That an amendment may be as well here, as in the Kings Bench before the Record be removed. (4)

2 Rol. 612.

Co. Litt. 125. b.
Hob. 37.

Ralph Lord Ewre *versus* Strickland, Pasc. 7 Jac. rot. Ebor.

- (5) **C**ovenant: Whereas Queen Elizabeth was seised in fee of the Capital-house and site of the Manor of Yarethorpe, and of the Lands thereto appertaining; And by her Letters Patents dated 5. Decemb. in the 29th year of her Reign under the great Seal demised them to the Defendant Strickland for 21 years; and the foresaid Strickland his Executors and Assigns were thereby tied to repair from time to time the said houses and fences, and to leave them sufficiently repaired at the end of the said term: And that the said Queen in the 44th year of her Reign, by her Letters Patents under the Great Seal granted the reversion to Burrell and Allen, and their Heirs, who by Indenture, (enrolled in Chancery within six months, and shewn in Court) by their said names on the one part, and the foresaid Ralph Lord Ewre, by the name of Ralph Ewre Knight, Lord Ewre of the other part, bargained and sold the reversion to the said Ralph Lord Ewre the Plaintiff, &c. and for not repairing the said houses, the Action was brought. The Defendant pleaded, That at the time of the bargain and sale, the said Ralph Lord Ewre was not Knight, nor known by the name of Ralph Ewre Knight, Lord Ewre: Et hoc, &c. Whereupon it was demurred, and resolved as to the plea in Bar; That a bargain and sale made to one by the name of Knight, who is not Knight, is good enough; For a Conveyance shall not be avoided for such causes; Especially when he is before sufficiently described by the name of Ralph Lord Ewre, which is a greater dignity: It was then moved, That this being by the Queens Patent, wherein the Lessee takes only, and not made by him, whether that clause for the repairing should be taken and interpreted as a Covenant on the Lessees part to bind him and his Assigns: And resolved, that it should; For when he takes by the Patent, he consents to all things therein: And the words in that clause or sentence, for the keeping and leaving the houses and fences in reparation, are as spoken by him; And it is a Covenant which runs with the Land. Vide 45 Ed. 3. 11. 39 Ed. 3. And although the Bargainee was not named Assignee in the Declaration, yet it is good enough: Wherefore it was adjudged for the Plaintiff.

1 Cr. 174.

Foss. 522.

Sir Thomas Beamond *versus* Sir Henry Hastings,
Mich. 7 Jac. Rot.

- (6) **A**ction for words: Whereas he was Justice of Peace of the County of Leicester, for divers years; That the Defendant spake these words of the Plaintiff, being a Justice of Peace, (viz.) He (præfatum querentem innuendo) for malice and spleen did many times wrest the Law, and pervert Justice to serve his own turn: The

The Defendant pleaded Not guilty, and found against him, and Damages taxed to 200 Marks; And now moved in arrest of Judgment, that it is not certainly alledged that the words were spoken of the Plaintiff, for he doth not shew that the Defendant had Communication with any other, of the Plaintiff, or that it was about Execution of his Office; And then the words being, He did, &c. Non constat whether they were spoken of the Plaintiff, or that those who stood by, knew they were spoken of the Plaintiff; And then, although the Plaintiff now alledgeth that the words were spoken of him, (for he saith de prefato Thoma dixit, &c.) Yet Non constat that the standers by, at the time of the words spoken, knew or intended them to be spoken of the Plaintiff; otherwise the Action lies not: And the Plaintiffs averment and innuendo will not serve. Vide Co. 4. fol. 17. Secondly, because he doth not say, that after he was Justice of Peace he wrested the Law, &c. But only, That he did many times wrest the Law, &c. Which is in time past, and might be long before: Sed non allocantur; For as to the first, the Declaration being, That the Defendant de prefato Thoma dixit, &c. It is the usual course, and a sufficient averment. To the second, they shall be intended to be spoken in the worst part, and in scandal of him in his Office: wherefore it was adjudged for the Plaintiff; and Error thereof being brought, the Judgment was affirmed.

Ante 231.
Post. 674.

1 Cr. 317.
Post. 622.

Kent *versus* Elwis in the Exchequer-Chamber.

Action upon the Case: Whereas one Shepherd was indebted unto him by Bond in 300 l. And for non-payment thereof sued a Latitat out of the Kings Bench, directed to the Sheriff of Nottingham to arrest him, Returnable at such a day; intending upon his appearance, and Bail put in, according to the Course of the Court, to declare against him: (And shews the course and custom of the Court, That he upon appearance, should put in good Bail, that if Judgment were had against him, he should satisfy the condemnation, or render his body in Execution:) That he delivered the writ accordingly to John Thornegh Sheriff, who made a warrant to the Bailiff of the Kings Liberty of Newark, to execute it, which warrant was delivered to one Leighton, Deputy of the Lord Burleigh, Balivi libertatis Domini Regis Wapentagii sui de Newark, who by force thereof arrested the said Shepherd: That the Defendant rescued him out of the custody of the said Deputy, and he escaped, and withdrew himself to places unknown, I i whereby

(7)
2 Rol. 457.

Ante 224.

3 Cr. 158.

Co. 9. 26. 1.

whereby he had not any remedy for his debt : The Defendant pleaded Not guilty, and found against him, to his damages of 180 l. and adjudged for the Plaintiff : And Error thereof brought in the Exchequer-Chamber ; First, because the Custom of the Kings Bench is alledged to be, That if any one arrested comes sub custodia Vicecomit. he shall put in Bail : which is not so ; For he shall be in custod. Marechal. and no Declaration can be against him sub custod. Vicecomit. Sed non allocatur ; For the substance of the matter is, that he sued out Process to have him arrested for this Cause, and he being arrested was rescued ; which is the ground of the Action : And all which is alledged concerning the Custom, is idle, and the shewing thereof shall not hurt him. Secondly, (whereupon it was chiefly insisted) for that it is shewn, that he was rescued from the Deputy of the Bailiff of the Franchise ; where it ought to have been alledged, That he was rescued from the Bailiff himself, or from the Sheriff, as 39 H. 6. is : Sed non allocatur ; For there is diversity between this Case, which is an Action upon his Case, wherein he shall shew the truth as in rei veritate it is, and not as it is upon the return of Rescues or Endiments, which say, that it was done to the Sheriff or Bailiff himself : And a president was shewn Pasch. 31 Eliz. Rot. 248. between Burgh and Appleton Sheriff of Essex, where in such an action it was declared, That the Bailiff of a Liberty arrested the party, and delivered him to the Sheriffs deputy, and he rescued him from the Sheriffs deputy ; and Judgment given in this Action for the Plaintiff, which was affirmed in a Writ of Error. The third Error assigned was, because it is alledged that the Lord Burleigh fuit Ballivus libertatis Domini Regis de Newark ; and the King cannot have any Liberties ; For they are extinct when they come to his hands : Sed non allocatur ; For the King may have such Liberties by the suppression of the Abbeyes, (which are not extinct, but revived by the Statute of 32 H. 8.) or by some other means : And it shall not be intended to be extinct, unless it be so shewn, but shall be said to be still in esse ; and the Bailiff of a Liberty may well have a deputy : Wherefore the Judgment was affirmed.

Dockrey *versus* Tanning.

(8)

Ante 57.

DEbt upon an Obligation, conditioned for the payment of 120 l. at the full age of J. Burges, if it be demanded : The Defendant pleads, that the Plaintiff did not demand it after the full age of Burges : And it was thereupon demurred ; And without argument adjudged for the Plaintiff : For the bringing of the Action is a sufficient demand in it self.

Sir Richard Buckley *versus* Gyllam.

ERror; The Defendant pleaded a Release of Errors, bearing (9)
Teste 22. Januar. which was the second day after the day of
Essoignes, and before the day in full Court: And how this shall be
pleaded as after the day of continuance, or how he should have
advantage of his pleading, was the question upon Demurrer.
Vide 21 Ed. 4. 37. 14 H. 4. 14. 21 H. 6. 4.

Termino Trinitatis,

Anno octavo JACOBI Regis in Banco Regis.

Bowse versus Cannington.

(1)

Error of a Judgment in the Common Bench in Ejectione firmæ: The Error assigned was; For that William Brown of Bradfield was returned upon the Ven. fac. and Habeas corpora, and William Brown of Metfield who was another person, and not returned, was sworn: And upon this Error assigned the Defendant demurred in Law, Et quoad alios Errores in recordo, in nullo est erratum: And it was moved, That this was not assignable for Error; For it is against the Record, which is, that William Brown of Bradfield was returned and sworn: And although it was alledged, That in truth the other William Brown of Metfield was sworn, yet all the Court held it not to be assignable for Error, and that he is estopped to say the contrary; For then every Record may be brought in question, upon such surmise: wherefore without argument the Judgment was affirmed.

Ante 29.
Post. 353. 9.
457.

Sir John Ratcliff *versus* Davies, Hill. 7 Jac. Rot. 1217.

(2)

Yelv. 178.

Action *sur* Trover and Conversion of an Hatband set with Pearls and Diamonds: Upon Not guilty pleaded, a special Verdict was found; That the Plaintiff was possessed thereof, and pawned it to John Whitlock for 25 l. but no certain time appointed for the redemption thereof; That Whitlock being sick, his wife in presence, and with his assent, delivered it to the Defendant, and afterwards he made his said wife his Executrix, and died, who proved the Will; That the Plaintiff tendred to the said Executrix the said 25 l. who refused, and afterwards demanded the Hatband of the Defendant, who refused to deliver it; but converted it to his own use: whereupon, &c. And in this Case three points were moved; First, There being no time appointed for the redemption; whether it may be made after the death of him to whom it was pawned, or ought to be in the lives of both the parties: And all the Justices resolved, It may be well made after the death of him to whom it was pledged, but not after the death of him who pledged it. Yelverton and Croke

Post. 258.

Croke doubted, and held, that it could not; For he at his peril ought to redeem it in his time; as it is upon a Mortgage: But Fleming and the others against it; For pledging doth not make an absolute property, but it is a delivery only until he pays, &c. so it is a debt unto the one, and a Retainer of the thing unto the other; for which there may be a re-demand at any time upon the payment of the money; For the pledge delivered is but as security for his money lent, so as he who borrowes the money, is to have again his pledge when he repays it, and his tender gives him interest therein: And there is difference between mortgage of Land, and pledging of Goods; For the Mortgage hath an absolute interest in the Land, but the other hath but a special property in the Goods, to detain them for his security. 5 Hen. 7. 1. 9 Ed. 4. 25. 36 Ed. 3. Bar. 188. Secondly, It was resolved, that by this delivery of the said Goods by the *Feme*, with the assent of her *Baron*, to the Defendant, there passed no interest of them to the Defendant, but (as it were) a custody only: And therefore the tender of the redemption ought to be made to the Executrix, and not to the Defendant. Thirdly, That when he tendered the money to the Executrix, and she refused, it was as good as payment; and the especial property of the Goods is re-vested in the Plaintiff: Then, when he demanded them of the Defendant, and he refused to deliver them, but converted them to his own use, a Trover and Conversion well lies, although he came unto them by a lawful delivery, and not by Trover: wherefore it was adjudged for the Plaintiff.

Lit. Sec. 337.

Co. Lit. 208. a.

Hob. 187.

Richard Rooke *versus* Nicholas Rooke.

Assumpsit: Whereas the Defendant, 10. Febr. 7 Jac. in consideration he was indebted to the Plaintiff in 40 l. (viz.) Pro diversis denariorum summis ei prestitis, ac pro diversis eodem Richardo receptis & habitis, & pro quadam pecunia summa, by the Plaintiff at the Defendants request, to one John Amias solut. for diet, assumed to the Plaintiff, that he would pay the said 40 l. unto him, ante inceptiorem proximi itineris of the Plaintiff to London; and alledges in fact, that he upon the 23. Febr. following, inceptit iter suum ad London, and came thither the 29th of the same month; yet the Defendant had not paid him the said 40 l. licet sepius requisitus. After non Assumpsit pleaded, and Verdict for the Plaintiff, it was moved in arrest of Judgment, that the Declaration was not good; First, Because it is not shewn how much he was indebted for every of the causes, and so it is too general; Sed non allocatur; For it is not material, being that he was indebted so much in toto, he needed not to shew every particular. Secondly, Because he doth not shew that it was his proximum iter to London; For otherwise there is no cause of Action for the non-payment before that Journey.

And

(3)

Felt. 175.

Hob. 5.

Ante 207.

And although it was alledged, that it should be so intended, being in so short a time after the bargain, and no other being shewn; yet the Court held, that it was a material exception; For the duty grew upon the commencement of is next Journey: And therefore he ought to shew it, to enable himself to the Action, as if the promise had been to pay such a sum to him who first comes to Pauls: wherefore for this cause the Declaration was held to be ill, and adjudged for the Defendant.

Goodyere versus Ince.

(4)
Yelv. 179.

Hob. 68.

Co. 8. 96. b.
3 Cr. 504.

ERror in the Exchequer; For that, whereas the Defendant recovered in the Common Bench damages in a debt of 100 l. The Plaintiff thereupon had an Elegit into the County of Lancast. which mentioned that another Elegit issued before into London and returned nihil: And upon a Testatum est, it was commanded to extend all the Goods and Land, &c. And thereupon the Sheriff returned, That he took a Lease for years of Cythes, which he delivered to the Plaintiff, as bona & catalla sua for the said debt. The Error assigned was, because this Writ was with a Testatum; whereas there was not any Writ before awarded into London. The Defendant pleaded thereto, In nullo est erratum: And it was held to be a manifest Error; For although the Roll is, that 28. Nov. 7 Jac. an Elegit was awarded into London, and another into Lancashire, which was held to be good (for he might have it into as many Counties as he would) yet because it is with a Testatum (whereas it appears there was not any before awarded) it was held to be Error; And a President was cited to that purpose, between Jones and where a Capias ad satisfaciendum was awarded with a Testatum, whereas no Capias before had been awarded; which was reversed for this cause. But then it was moved, whether he should be restored to the Lease it self, or to the value for which the Sheriff delivered it in Execution (viz. 100 l.) For it was alledged that the sale was good, and that afterward it had come into two or three hands. But all the Court held, that this sale should not bind him; For there is a difference between this sale and delivery upon an Elegit to the party himself, and a sale to a stranger upon a Fieri facias; For the Fieri facias gives authority to the Sheriff to sell, and to bring the money into Court; wherefore when he sells a term to a stranger; although the Execution be reversed, yet he shall not by virtue thereof, be restored to the term, but to the monies: because he comes duly thereto by act in Law; But the sale and delivery of the Lease to the party himself upon an Elegit, is no sale by force of the writ delivered in extent; which being reversed, the party shall be restored to the term it self: wherefore the Execution was reversed, and a writ of Restitution awarded.

Aderton

*This word of That. of Writ.
Cap. 18. and 3d Vicarior &
biv. in 3d Plant.*

Aderton *versus* Dunstar.

ERror of a Judgment in the Kings Bench, in an Assumpsit; (5)
 Whereas he had sold to the Defendant nineteen pieces of
 Pynnes, containing 189 hundred, and 21 pound weight, at the
 rate of 18 s. 6 d. the hundred, quæ in toto se attingunt to 174 l.
 19 s. 8 d. That the Defendant in consideratione inde assumed
 and promised to pay unto him at the end of a month the sum of
 174 l. 19 s. 8 d. And that he had not paid. The Defendant pleads
 Non assumpsit, and found against him, and Judgment for the
 Plaintiff: And it was now assigned for Error, that the sum con-
 tracted for was more than 174 l. 19 s. 8 d. according to the rate
 of 18 s. 6 d. the hundred weight; For it amounts to 1 d. ob. more,
 so it cannot be a promise to pay that sum: And all the Justices
 of the Common Bench, and Barons of the Exchequer, held it
 to be an Error; For it is not possible to make an Assumpsit to
 pay that which is not the bargain. And although it was alledged,
 that the promise peradventure might be for less than what was
 agreed to be paid upon the bargain (as if he had promised to pay
 100 l. at such a day) it had been good; yet they held, that such
 an intendment perhaps might be, when a lesser sum is so promised.
 But here, when the promise is to pay the said sum of 174 l. 19 s.
 8 d. that refers to that sum which is cast up, which is apparently
 false; And therefore the promise cannot be in such manner; And
 for that cause is a Disposition, and the Declaration ill: Where-
 upon the Judgment was reversed. Note, this was upon the first
 motion, without further advisement.

Hob. 88.
 Moor 298.
 Post. 499.
 Post. 536.

Heynes *versus* Sprot.

Action for these words; Thou wast in *Norwich* Gaol for a (6)
 Robbery committed upon A. B. The Defendant pleads Not
 guilty, and found against him; And Judgment for the Plaintiff.

Hob. 177.
 1 Cr. 269.
 Ante 154.
 Post. 536.

The King *versus* in the Common Bench,
 Trin. 8 Jac. Rot. 1811.

Quare impedit to the Vicarage of Hunston in Suffex, by the (7)
 King against . . . and the Bishop. The Case was such,
 The King had the Advowson of the Vicarage belonging to such
 a Mannor, by reason of the Wardship of the . . . which be-
 came void during the minority of the Heir: The Heir sues Li-
 berty; The King presents thereto under the Great Seal: And af-
 terwards (without mentioning this first presentment) presents
 thereto another under the Seal of the Court of Wards; The se-
 cond Presentee is admitted, instituted and inducted by the Bishop
 before

1 Cr. 99.

Moor 874.

before any notice of the first Presentment: The King brings a Quare impedit against the first Presentee; and adjudged that it lay not: For by Coke and Warburton, it was within the disposing of the Court of Wards, although it were after Livery, because it was a Chattel vested: And by Coke, The Statute of 32 H.8. in equity extends to Adowson. Also by Coke and Foster, the second Presentment under the Seal of the Court of Wards is good; For the King may present by Paroll, 19 Ed. 3. Quare impedit 60. 38 Ed. 3. 3. For nothing is granted or given by the Presentation; For it is but a Commendation or Declaration of the Kings will; which as it may be by Paroll, so clearly it may be under the Privy Seal. And Coke said, that a Presentation is not to be compared to a Grant, or other Cases, for that is singular: And it was ruled in the Case of the Dean of Norwich, where a Presentment was made by the wrong name of a Corporation, yet it was good: And if the King hath a Ward, he shall have the Presentation which fell in the time of his Ancestor, and the Executor shall not have it. And it was adjudged, that if a man presents ad Rectorem, it is as good as if he had presented ad Ecclesiam: And thereupon a Book was cited. The King hath an Adowson in Right of the Duchy, which becomes void; he may present thereto in Right of the Crown: And by Coke, Warburton and Foster, the King may vary in his Presentation, without reciting the former: And it shall not be void by the Statute of 6 H. 8. c. 15. And there it was said, that a Presentation under the Erchequer Seal was not good.

Johns *versus* Lawrence, Trin. 8 Jac. Rot. 1130.

(8)
Jones 220.

DEbt upon an Obligation of 1000 Marks, conditioned, Whereas the Obligor had procured from Queen Elizabeth Letters of Presentation to the Church of Stretham, and was to present Lawrence, intending when his Son John should be capable, to procure another Presentation of him to the said Church, if the said Obligor within three months after request, upon his Presentation, Admission, Institution, and Induction to the said Church, should resign his Benefice absolutely: That then the Obligation shall be void. The Defendant pleads, that he was not requested: And Issue joyned thereupon, and found for the Plaintiff: And moved in arrest of Judgment, that it appears by the condition of the Bond, to be a Simoniackal Contract, and against Law, and therefore the Obligation void: Sed non allocatur; For there doth not any Simony appear upon the condition; and such a condition is good enough and lawful: Wherefore it was adjudged for the Plaintiff. Afterwards a Writ of Error upon this Judgment was brought in the Erchequer Chamber, and the principal Error insisted upon, was, That this Condition is against Law; For it appears upon the Con-
dition

dition entred, that it was for Simony; which makes the Obligation void. But all the Judges of the Common Bench, and Barons of the Exchequer held, that the Obligation and Condition are good enough; for a man may bind himself to resign, ^{1 Cr. 180.} and it is not unlawful, but may be upon good and valuable reasons, without any colour of Simony; as to be obliged to resign, if he take a second Benefice; or if he be non-resident for the space of so many months; or as this Case is, to resign upon request, if the Patron will present his son thereto when he should be of age capable to take it. But if it had been averred, that it was per colorem Simonii, viz. If he did not suffer the Patron to enjoy a Lease of the Glebe or Tythes; or if he did not pay such a sum of money, That had been Simony, and 'tis possible, might have made the Obligation void: But as this Case is, there doth not appear any cause to adjudge it to be void for Simony: wherefore the Judgment was affirmed. ^{Post. 274.}

K k

Termino

Termino Michaelis,

Anno octavo JACOBI Regis in Banco Regis.

Tollhurst *versus* Brickinden. Trin. 8. Jac. Rot. 5.

(1)

Assumpsit: Whereas he was in communication with the Defendant to buy two fat Oxen, and promised to pay for them infra breve tempus 17 l. That the Defendant thereupon assumed to deliver them unto him, and shews, that within fourteen days he payed 9 l. and was ready to have paid the residue; and that the Defendant delivered unto him one of the Oxen, but would not deliver the other, &c. Upon Non assumpsit pleaded, and found for the Plaintiff; it was moved in arrest of Judgment, That the promise to pay infra breve tempus is uncertain, and is not any consideration at all, and the other thereupon is not bound to keep his Oxen for him, but may sell them to any other; and although he offered to pay within fourteen days, that is not material; and of that opinion was all the Court: For breve tempus is uncertain, & non constat what time it is; and if there be any certainty, it ought to be such a time only, as he might have and fetch his money; and the other is not bound to attend him any longer time: Wherefore the Declaration that he returned within fourteen days and tendered the money, is not material. Whereupon it was adjudged for the Defendant.

3 Cr. 19.

1 Cr. 241, 242.
Fosk. 683.

Carre *versus* Barker.

(2)

Error of a Judgment in the Common Bench; For that he appeared by Attorney and not by Guardian: Whereas he was, and yet is an Infant, Et hoc paratus est verificare prout curia, &c. & petit breve de pramonendi. And was admitted by Rey his Guardian to assign that for Error: The Defendant pleaded, In nullo est erratum; and it was now moved, that this assignment of Error was not sufficient, because he concludes, Et hoc paratus est verificare prout curia, &c. Whereas he ought not to conclude prout curia: But it was good enough, being Et hoc paratus est, &c. It was then moved, that the Writ of Error was discontinued, because the entry is, Ad quem diem prædictus Carre per Attornatum suum infra script. where it ought to have been per custodem suum, &c. And of that opinion were Fenner, Yelverton and Croke, cæteris absentibus: Wherefore the Plaintiff prosecuted a new Writ of Error.

Booker

Booker *versus* Evans.

Trespals of false Imprisonment, *Apud le clofe de Lincoln*; The Defendant justifies as Constable there, but his justification was ill; the Plaintiff takes Issue, *de son tort demesne sans tiel cause*, and found for the Defendant: It was held by all the Court, although the justification were insufficient; yet, being an Issue and tryed, Judgment shall be against the Plaintiff: Wherefore it was adjudged accordingly. (3)

Ant. 134;
1 Cr. 179.
Post. 283.

Boulney *versus* Curteys, Hill. 7 Jac. Rot. 864.

Covenant: And declares upon an Indenture of bargain and sale, of three Ward-lands in D. wherein he covenants to make further assurance, and to do any act or acts, &c. as shall be devised; and shews, that he demanded of him before a Lawyer, and tendered a Note of a Fine, comprehending, That he would levy a Fine of three Messuages, 100 Acres of Land, 40 Acres of Meadow, 30 Acres of Pasture; and that he required him to acknowledge it before such a Justice of Assise, and that he had not acknowledged it, although he were thereunto requested such a day, year and place. The Defendant pleads, That in the Note of the Fine, two Messuages and two Cottages were comprised, which were others, and more than he intended to assure; and it was thereupon demurred, and now moved by Thomas Crew for the Defendant, that the breach was not well assigned; First, because it was not shewn, that any Writ of Covenant was brought, or depending at the time of this request, which ought to be done on his part, otherwise no Fine can be levied: And in proof thereof he relied upon 8 Ed. 4. 20 Ed. 4. 11 H. 4. Secondly, in regard this Fine is tendered of more than he ought to levy, that he is not bound to levy any Fine at all: But the whole Court to the contrary; for as to the first, he hath covenanted to do every act as shall be requisite within 12 miles to be done; and this Note of Fine is an act, and whether it be well levied or to no purpose, is not material, he is bound to perform it: And although the fine be levied of more than it ought to be, it is not material; For of the residue it is to the use of the Conusor himself: Wherefore it was adjudged for the Plaintiff. (4)

Moor 810.

Moor 811.

3 Cr. 370. 1.

.....*versus* Candish.

Error of a Judgment in Trespals of Assault, Battery and wounding; divers Errors were assigned which were over-ruled to be no Errors; one was assigned ore tenus, That the Defendant quoad the Battery and wounding was Not guilty, and quoad the assault justifies; The Issue was joyned, *de son tort demesne*,

(5)

Ant. 118.
Post. 599.

demeasiz, both Issues found against the Defendant; and for the first battery and wounding, 6 d. damages, and for the assault upon the other Issue, 1 d. damages, and Judgment given for the Plaintiff accordingly: Whereas the Jury ought not to give damages for the assault, because it was included in the first Issue, and that being tried this needed not; and in regard they found damages severally, it is double damages for one and the same thing; which ought not to be: Wherefore it was reversed.

Hunston *versus* Cocket.

(6)

4 H. 4. cap. 12.

Post. 517.

Co. 6. 29. b.

DEbt upon the Statute of 2 Ed. 6. for not setting out Tythes: The Jury find a special Verdict, that a Prior was seised of the advowson of this Parsonage, and 24 H. 8. the Church being then void, the Bishop gave him licence to hold it in proper uses; and that there was not any endowment of the Vicarage: And they find the Statute of 4 H. 4. of appropriations, and the Statute of 27 H. 8. which gives Priors and Religious houses to the King; and that the King presented the Plaintiff by Lapse, who was admitted, instituted and inducted; and that the Defendant did not set out his Tythes, Et si, &c. The points intended were, whether the Appropriation was good, there being no endowment of the Vicarage; and whether this Statute, being in the affirmative, (That Vicarages should be endowed) makes all Appropriations void, unless there be a Vicarage endowed; and whether an Appropriation by the Bishops Licence without the Kings Licence, be good. But Williams said, it hath been resolved, That whether Appropriations be good or not, cannot now be called in question, but they shall be intended to be good, and to have all requisite circumstances; and the Statute gives them to the King, and doth not except any mans Right, unless theirs only who had right at that time, which no Parson now hath: But this Case was without Argument adjudged for the Defendant; for the Plaintiff claims per presentationem Regis ratione lapsus: Whereas it appears, if the King had any Title to present, it was Jure coronæ, and so the presentment merely void; and it is an Admission, Institution and Induction without any Presentment, which is merely void, as it was adjudged between Green and Baker, quod vid. Wherefore for this cause, it appearing that the Plaintiff had not any Title, it was adjudged for the Defendant.

Fountain *versus* Grymes, Mich. 7. Jac. Rot. 197.

(7)

DEbt upon an Obligation of 300 l. conditioned for the payment of 20 l. per annum, during the Lives of the Plaintiffs Wife and Son; the Defendant pleaded the Statute of Usury, and how he came unto the Plaintiff to borrow of him 120 l. according

according to the rate of 10 l. per 100 l. who refused to lend the same, but corruptly offered to deliver 120 l. unto him, if he would be obliged to pay 20 l. per ann. during his, the Plaintiffs wives and sons lives; and thereupon the Defendant entered into the said Bond for security of the payment of the said 20 l. per ann. unto them, which is above the rate of 10 l. per cent. And so the Bond supposed to be void: Whereupon it was demurred; and after arguments on both sides resolved, That this (being an absolute bargain in consideration for the payment of 20 l. per ann. during two lives, and no agreement to have the principal money) was out of the Statutes against Usury: But if there had been any provision made for the repayment of the principal, although not expressed within the Bond, it had been an usurious agreement, and lending within the said Statutes. And of this opinion was the whole Court, who adjudged it for the Plaintiff. Vid. Co. 5. Rep. fol. 69. Burtons Case, & fol. 70. Cleytons Case, Statutes 37 H. 8. cap. 9. & 13 Eliz. cap. 8. Post. 508.

Marsham *versus* Hunter, Trin. 7 Jac. Rot. 120.

TRespals: Upon Demurrer for Trespals in Straton Heath: (8)
 The Case was; a Copy-holder for life had Common in the Yelv. 189.
 Lords waste (as all other the Copy-holders had by Custom of that Mannor;) the Lord grants and confirms the said Copyhold Messuage and Land cum pertinentiis to him and his Heirs: Whether this purchaser shall have Common there as the Copyholder had, was the sole question; and resolved by all the Court, he should not; for he hath his Common by reason of the Custom, which annexeth the same to his Customary Estate; which being destroyed and determined by his own act, in making it a Freehold, the Common is also destroyed and determined, and cannot continue without special words: They also resolved, That those general words, cum pertinentiis, will not serve. And Williams in his argument mentioned the Case of one Dr. Sheldon in the Common Pleas, who had divers Copy-holders that had Common in his waste Lands, who severally purchased the Freehold of their Copyhold Estate: And he said, it was adjudged, that their Common is thereby destroyed: And a precedent was cited, 42 & 43 Eliz. Rot. 367. in this Court betwixt Forth and Ward, where a Copyholder had used to take Estovers to repair his hedges; and the Lord granted unto him the Freehold of the Copyhold by the words of Grant unto him, all the Lands, Tenements and Hereditaments thereto appertaining, and thereto used and occupied. Yet it was resolved, he should not have Common in the Land of the Lord: So here; Wherefore it was adjudged accordingly for the Plaintiff. Hob. 190.
Ant. 126.

Neal *versus* Sheaffield, Trin. 8 Jac. Rot. 742.

(9)
Yelv. 192.

Co. 5. 117. a

Co. 5. 117. a

DEbt upon an Obligation of 14 l. conditioned for the payment of 7 l. at the birth of the Plaintiffs Child: The Defendant pleaded, That before the birth of the Child, it was agreed betwixt the Plaintiff and Defendant; whereas the Plaintiff was to have a load of Lime of the Defendant; for which he should be indebted unto him; that the Defendant should acquit him thereof, and accept of that Debt in satisfaction of the said Obligation; and that the Plaintiff such a day, year and place accepted of the said load of Lime in satisfaction of the said Bond: Upon this Plea the Plaintiff demurred in Law; and now Yelverton for the Plaintiff moved two exceptions to this Plea: First, that nothing can be taken in satisfaction of the 7 l. it not being a duty, but a summe payable in future, and a contingency. But hereof the Court doubted; for if one be bound by bond conditioned to pay money when l. s. comes from beyond sea, this is a debt and duty presently, and the payment only deferred. The second Exception was, The Defendant pleaded, that the Plaintiff accepted the load of Lime in satisfaction of the bond, which cannot be; but it ought to have been pleaded in satisfaction of the sum mentioned in the condition of the bond; for the bond it self cannot be discharged without speciality; and for this cause all the Court held the Plea to be ill; and therefore adjudged for the Plaintiff.

Odell *versus* Moreton, Mich. 7 Jac. Rot. 539.

(10)
2 Rol. 604.
Yelv. 211.
Hob. 138.

Co. 5. 91. a

ERROR of a Judgment in Durham in an Ejectione firmæ of a Cole-mine: The Error assigned was, That the Defendant was admitted to plead by Attorney, being within age at the time of the pleading; and Issue thereupon, and found for the Plaintiff: and now Error being brought, it was moved, that the Writ was not good; for it reciting the Error to be in the Record of a Judgment before the Bishop and eight others therein named; and by the Record removed, it appears to be before nine Justices, viz. Sir Henry Linley, who was not mentioned in the Writ of Error to be any of them before whom the Judgment was given: and for this cause, it was urged at the Bar, that the Record was not well removed, and then they had no authority to proceed. But it was thereto answered, That in regard it was before nine, it was before eight, so as there is not any falsity therein: But not e converso; and in proof thereof was cited 31 Aff. pl. 1. and the Earl of Leicesters Case in Plowd. Comment. But all the Court conceived, that the Record could not be examined upon this Writ

Writ of Error; but there ought to have been a new Writ of Error de recordo quod coram vobis residet; as it hath been ruled where the Writ of Error was before Sir James Dyer & sociis suis: It being before Sir Anthony Brown, was not good: also, upon view of the Record, it appears, that the Writ of Error was directed to the Bishop and eight others, to remove the Record of a Judgment, &c. And eight of them only certified the Record, and not the ninth; nor doth it appear, that he was dead or removed; and for this cause also the Writ was held to be ill. Vid. 28 H. 6. 11. Hob. 139.

Ash versus Brudnel.

Action upon the Case; for that he tore off the Seal of a Deed whereby John Ash granted unto him, unum annualem redditum sive annuitatem of 10 l. during his life: Not guilty being pleaded, and found for the Plaintiff; it was moved in arrest of Judgment, first, because he doth not shew whether it were an Annuity, or a Rent issuing out of the Land. Secondly, because he doth not shew, that it was the Seal of the Grantor; for it is sigillum eidem annexat. and he doth not say, the Seal of the same Deed, nor the Seal of the said John Ash; also he sets not forth that by reason thereof the Deed lost its force, nor that he lost the annuity, so as he shews not any ground for the action. But notwithstanding these and other exceptions, it was adjudged for the Plaintiff. (11)

Gybson versus Harbottle, Pasch. 7 Jac.

Rot. 93.

Debt, by an Executor: The Defendant pleaded a release of the Testator made unto himself; and upon Non est factum pleaded, and found against him, and Judgment in Misericordia, Error thereupon was brought, because it ought to have been a Captatur; for that he pleaded a false Deed. Vid. 33 H. 6. 54. 3 Ed. 6. Dy. 67. Co. 8. 60. a (12)

Gomerfale versus Ways.

Action sur Trover: The Defendant pleaded that he took them as Bailiff of the King for Distresses upon a Plaint in curia Manerii, and sold them: And it was thereupon Demurred, and adjudged ill; for upon a Distringas, the Cattel shall not be sold, especially in a Court Baron, although it were in the Kings Court. (13)
Yelv. 194.

Cottons Case.

(14)

1 Cr. 146.

Henry VWilliams having sued Hugh ap Owen ap Lloyd, for a Debt of 55 l. he being enforced to put in special Bail, one Henry Cotton became one of his Bail, and took upon him the name of Thomas Cotton of Reading in the County of Berks, (who was a Freeholder of good Estate) and so had done in divers other Actions, and gave always the name of Thomas Cotton, who was his brother, for Bail: And now the Plaintiff having recovered against the principal, and sued two Scire facias against the Bail, and having Judgment and Execution awarded against him, and taken thereupon, he complained of all this practice to the Court, and proved by divers witnesses, that he was not at London at the time of the Bail taking; and it was confessed by the Defendant, and those who procured the Bail, That Henry Cotton put in the Bail: Whereupon this matter being disclosed, for that it was done in deceit of the Court, it was awarded that a Vacate should be made of that Bail quoad him, and of the Judgment in the Scire facias: And Manne shewed a precedent to the Court where it was so adjudged.

Dowglass *versus* Kendal, Mich. 7. Jac. Rot. 356.(15)
Yelv. 187.

TRespals: For taking and carrying away 30 Loads of Chorns of the by him cut down, and lying upon his Land at Chippingwarden, in a place called the Common VVaste. The Defendant justifies, because the place where is an Acre, and that he is seised in Fee of a Messuage and three Acres of Land in Chippingwarden aforesaid; and that he and all whose Estate it was, &c. have used from time to time to cut down and take omnes spinas crescentes upon the said place, to expend in the said house, or about the said Lands as pertaining to the said house and Lands: And so justifies, &c. The Plaintiff shews, that Sir Richard Saltington was seised in Fee of the Mannor of Chippingwarden, whereof the place where, &c. is parcel, and granted Licence unto him to take the Chorns; whereupon he cut them down, and the Defendant afterwards took them: And upon this Plea it was demurred; and after argument at the Bar, adjudged for the Defendant; for as this Case is, the Lord may not cut down any Chorns; nor licence any other to cut them down; for the Defendant prescribeth to have all the Chorns growing upon that place; and this Prescription excludes the Lord to take any Chorns there; But if he had

3 Cr. 435.

had claimed Common of Estovers only, then if the Lord had first cut down the Thorns, the Commoner might not take them; and if he had cut down all the Thorns, the Commoner might have had an Assise: But here he prescribes to have all, which is admitted by the Replication, and is well enough; and so hath been resolved in one Kenricks Case, that one may prescribe to have the sole pasturage in such a place, from such a time to such a time, against the owner of the soil, who shall not meddle therewith during that time: It was also held, although he doth not prescribe, that it was an ancient house to which, &c. yet it is good enough; and so is the usual Prescription for Common, and shall be so intended: Wherefore it was adjudged for the Defendant.

Moor 411.

Yelv. 188.

Ant. 208.

Smith *versus* Johns.

A Sumpsit, and declares; Whereas Paul Southard demised (16) unto him a Legacy of 7 l. and made his Wife his Executrix; and the Defendant married with her, and had divers Goods of the Testators in his hand; that the Defendant in consideration the Plaintiff would forbear to sue him for that Legacy, promised to pay it; and alledged in fact, that he forbore to sue him, &c. The Defendant pleaded, That his Wife was dead before his promise supposed to be made: Whereupon it was demurred; and afterwards upon a motion adjudged for the Defendant, for the Wife being dead, he is not chargeable: And although it were alledged, that he had Goods in his hands, yet it is not shewn how he had them, and he is thereby liable to the Executor or Administrator for them: Wherefore, &c.

(16) Yelv. 184.

Berreblook *versus* Michel, Trin. 7. Jac. rot. 1050, or 1650.

A Sumpsit: Whereas Thomas Lord Burgh, 1 April 39 Eliz. (17) was possessed of divers Goods and Chattels, (viz.) of a pillar of Gold, &c. Et inter alia de uno Anglice Abilement of Gold, &c. ad valentiam 500 l. And pledged and delivered them the same day and year to the Plaintiff for 400 l. And whereas the said Lord Burgh was indebted unto him in 25 l. for Silver Plate which he sold and delivered to the Lady Frances, Wife of the said Lord Burgh; and that he being so indebted died: That the Defendant the ninth of May 40 Eliz. in consideration the Plaintiff would at the Defendants request deliver to the said Lady Burgh being a Widow the said Goods and Chattels, ad tunc existent ad valentiam 500 l. pledged unto him ut prefertur, for 403. l. 6 s. 8 d. by the Defendant to be paid, assumed that he would pay to the Plaintiff the 25 l. when he should be requested; and alledgeth in fact, that he, the said 9 May 40 Eliz. at the Defendants request, upon the payment of the said 403 l. 6 s. 8 d. delivered

Ant. 43.

Ant. 222.

Ant. 244.

libered to the said Lady Burgh the said Goods and Chattels so pledged unto him; and that the Defendant licet such a day he was requested, had not payed the said 25 l. After Non assumpsit pleaded, and found for the Plaintiff, it was moved in arrest of Judgment; first, because there is a blank left for one parcel of the Goods, although it is Anglice an Abilement of Gold, yet it is not good; for it is parcel of the consideration, which ought to be certainly alledged: Sed non allocatur; for it was said by the Court, that it was but an inducement to the Action; but it was resolved, that it could not be amended, being after Verdict, (although it was so prayed) because it was said, that it was but a default of the Clerk to omit the Latin word, leaving a space for it. Note, that afterwards by award it was amended. Secondly, it was moved that the consideration was not good, because the declaration is, in regard the Lord Burgh was indebted unto him in 25 l. for Plate sold and delivered to his *Feme* to his use; but it is not averred, that the *Baron* agreed thereto, or that it came to his use: Sed non allocatur; for it is necessarily to be intended. Thirdly, the declaration is not good, because it is not averred, that they were of the value of 500 l. at the time of the delivery of them to the Lady Burgh; for that is the principal part of the consideration: Sed non allocatur; for being delivered the same day of the Assumpsit, they shall be intended to be of the same value. Fourthly, that the pledging being for 400 l. and the Goods alledged to be of the value of 500 l. the delivery of them for 403 l. was held to be a good consideration: Wherefore it was adjudged for the Plaintiff. Note, that a Writ of Error was brought upon this Judgment, and the same matters assigned for Error, and the Judgment affirmed.

Llewelyn *versus* VWilliams, Philips & Morgan,
Trin. 8. Jac. Rot. 150.

(18)

Co. 4. r. b.
Co. Lit. 46. b

Ejectione firmæ: Of a Lease made the 12 Decemb. Habendum a primo die; upon Not guilty pleaded, the Jury found a Lease made in hæc verba, which was dated the first of Decemb. Habend. from henceforth, but delivered the 12 Decemb. Whether that were according to the declaration, was the question: for it was objected, That from the day of the date, and from henceforth are several Commencements; for the one begins upon the day it was sealed, the other the day after. But it was resolved by the Court, that they are both one, being a computation of time from the time past, and both shall be pleaded to begin from the day of the date, when the Lease is afterward sealed another day; but if he declares of a Lease of the first of Decemb. Habendum a die datus, the Ejectment cannot be alledged the same day; but if the Lease be made the first of Decemb. Habend. henceforth, the Ejectment may be alledged the same day: Wherefore it was adjudged accordingly. Vid. ante Mich. 4 Jac. Osborn. *versus* Ryder.

Aylot

Aylor *versus* Chep.

T Respass: Upon demurrer the Case was; One deviseth his Lands to his two Sons, and the Heirs of their bodies: and saith, that his Executor shall have them until they come to their several ages of twenty one years. The one attains to the age of twenty one years; and whether he might enter or no, was the question: For it was objected, that it was a joynt Estate unto them, and that the Survivor should hold place for the Freehold, which cannot be, if they should have several Commencements, and that the Executor should hold them until they both come of full age: And of this opinion was Williams; but the other four Justices e contra; for the words being, until they accomplish their several ages; that is, reddendo singula singulis, when either of them came to the age of twenty and one years, he should then have his part and possession; and yet the joynt-tenancy should hold place: Wherefore it was adjudged for the Plaintiff.

(19)

Yelv. 183.

1 Cr. 75.

Dyer. 25. a

Co. 5. 8. a

Co. Lit. 188. a

The King *versus* Stanton, Mich. 4. Jac. Rot.

Quo Warranto: For claiming a Leet and Court Baron from three weeks to three weeks, infra Manerium de Warfield, & de Wargrave, and to have bona & catalla felonum, and divers other Liberties: He disclaims in all, besides the having of a Court Baron within his Mannor of Warfield; and thereto he saith, that Sir Henry Nevill was seised in Fee of the Mannor of Warfield, whereof the Mannor of Newname, the Mannor of Lasfield and the Mannor of Aylward, within the said Mannor of Warfield were parcel, and demised and demisable, time whereof, &c. in Fee, by Copy at the will of the Lord, according to the custom of the Mannor of Warfield: And that the Mannor of Newname is known, and time whereof, &c. had been known as well by the name of the Mannor of Newname, as by the name of a Messuage, and seven acres of customary Land, and 20 s. Rent; and by that name was demised by a Copy: And that Sir Henry Nevill 18 Eliz. granted it by Copy to the Defendant in Fee, by the name of a Messuage, &c. ac ratione & virtute prædictorum, he held a Court Baron, and claimed from three weeks to three weeks, tanquam pertinent, &c. The like Title he made for the other two Mannors: And it was thereupon demurred. First, It was moved, whether a Quo Warranto did lie of a Court Baron: For it is incident to the Mannor, and is not any Liberty which the King can have distinct from the Mannor; and being of common right, the King cannot have a Quo Warranto thereof: And of that opinion was Fleming, Chief Justice. Fenner doubted thereof: But Yelverton, Williams and Croke held, that a Quo

(20)

Co. 11. 17. a

Yelv. 190.

Warranto well lies; For it is matter of Right to hold Courts, and to administer Justice, and to hold Pleas, and to draw Assemblies of men together, and to swear Officers; which if any doth without Right, he is to render an account thereof: And therefore a Quo Warranto lies, to shew by what Title he holds it. But if he there intitles himself to the Mannor, then he needs not to shew that he is to have a Court Baron; for that is incident thereto, 17 Ed. 2. Quo Warrant. Coke 3. fol. 138. 141. And here the Judgment is not, that the King shall seise; because it is not any such Franchise as the King may have; but it is, that the Defendant shall be ousted of that Liberty, as 15 Ed. 4. 7. is. And so it was cited to be adjudged in Chadwells Case, for the Mannor of Exon. But they all held, that a Copyholder cannot hold a Court Baron, to have forfeitures, and hold Pleas in a Writ of Right; for it is Oppositum in objecto, that a Tenant at will should hold a Court. But Fleming said, that a Copyholder peradventure, if it had been well pleaded, might have a Court to admit other Copyholders there. But the other Justices denied it; for a Tenant at will cannot grant an Estate to another: Wherefore it was adjudged for the King, that he should be ousted.

Co. 11. 17, 18.
1 Cr. 43.
Post. 327.

Wood *versus* Ingersole, Pasc. 7 Jac. Rot.

(21)

Ejectione firmæ: Upon a special Verdict, the Case was; a man having three sons, John, Edward, and William, and Lands in three several Villages, viz. A. B. and C. devises the Lands in A. to John his son, the Lands in B. to Edward his son, and the Lands in C. to William his son; And that if any of them died, the other surviving shall be his Heir. John the eldest son hath Issue J. and dies: whether the Land in A. shall go to Edward and William the younger sons, or to the Heir of John the eldest son, was the question betwixt the Defendant, claiming by a Lease from the Heir of John the eldest son, and the Plaintiff claiming under the said Edward and William, the younger sons. And after argument at the Bar, Fleming Chief Justice said, that he conceived it might best in the two younger Sons by way of Remainder: And these words, That every one shall be Heir to the other, *Tant amount*, and imply that every one shall have it after the other; for although the freehold Estate of the eldest Son shall be drowned by the descent of the Fee; yet it was not so drowned, but that by his death the surviving sons should have it for their lives, by this Limitation, and the intent of the Will; wherefore such Construction is to be made to uphold it, if possible may be. But all the Justices besides Fleming were of opinion, in regard nothing but a Freehold passed by

2 *saund.* 386.
1 *Wool.* 306.

by the devise, the Reversion in Fee descending upon the eldest, had downed that Estate; and that his death afterwards could not revive and best the Remainder in William and Edward: Wherefore it was adjudged for the Defendant.

Dobson *versus* Keys, Trin. 7 Jac, Rot.

DEbt upon an Obligation of 10 l. dated 23 January, 1608. ⁽²²⁾
 The Defendant demands *Oyer* thereof; which was entred ^{Yelv. 193.}
 in hæc verba; Noverint universi per presentes me Keys teneri
 & firmiter obligari VVillielmo Dobson in decem libris bene & fide-
 liter solvend. dat. tres viginti dies Januarii, anno Regis Jacobi An-
 glia 42. & Scotia 6. & anno Domini, 1608. And it was signed
 Robert Keys. And it was demurred, whether it were a good
 Bond, and whether the Declaration is well warranted thereby,
 and adjudged to be good; for it is but false Latin, which shall ^{Ant. 147.}
 not make void a Bond; and the date is impossible, as to the ^{Co. 10. 133. a}
 year of the King; but the year of the Lord, and the day of the
 month sufficeth: And the name of the Obligor subscribed, is ^{Co. 2. 5. a}
 sufficient, though there be a blank or blot for his Christian name ^{Post. 640.}
 in the Bond: Wherefore it was adjudged for the Plaintiff.

Ward *versus* Ellayn, Pasch. 8 Jac. Rot. 166.

ERror of a Judgment in an inferior Court: The Error as- ⁽²³⁾
 signed was; because the first Process was a *Capias*, where ^{Ant. 108.}
 it ought to have been a *Summons*: And it was therefore re- ^{1 Cr. 91.}
 versed.

Hawkins *versus* Moor.

Ejectione firmæ: By the Lessee of Sir Henry Brown, against ⁽²⁴⁾
 the Defendant, Lessee of the Countess of Pembroke, of Lands ^{Yelv. 180.}
 in Killington, and two other Villages. The Defendant pleaded ^{2 Rol. 630.}
 Not guilty; and at the *Nisi prius* pleaded, that the Plaintiff *puis le*
darraine continuance, entred into a Close parcell *præmissorum*, and
 him expelled: And it was thereupon demurred; and the Cause
 was, for that he doth not declare in which of the Villages the
 Closes lay. And now Yelverton (before the Plea was made) mo-
 ved the Justices at Serjeants Inn in Fleet-street, whether this
 Plea were receivable: And they all held that it was; for it is
 matter *in fact*, and peremptory to him who pleads it. And al- ^{Post. 303.}
 though it was objected, that thereby all Tryals may be staid,
 yet it was said, that as a Release or matter of Bar may be
 pleaded, and is receivable, so may this Plea at the discretion of
 the Justices, if they perceive any verity therein. Secondly,
 It was moved, whether the Justices of *Nisi prius*, before cer-
 tificate

tificate of it with the postea, may suffer amendment thereof, as was instantly prayed: But they all held, that he ought not to suffer any amendment thereof; For his authority is but to receive the Plea, which being tendered at the Assises, during the time of the Assises might have been amended; and the Plaintiff ought not to have replied thereto; But after the Assises past, his authority is determined. Therefore according to that opinion he certified the Plea, with the Postea, into the Exchequer, where the Action was brought: And there the Plaintiff demurred upon this Plea; which being entered, was argued the same Term: And for that cause it was held, that the Plea was ill in substance; for it is uncertain, and there cannot be any tryal for the want of the places: Therefore it was adjudged for the Plaintiff.

Grymes versus Shack.

(25)
1 Cr. 19, 89.

Post. 331.

Action *sur* Trover and Conversion, of one hundred Musk-cats, and sixty Monkeys: The Defendant pleads Not guilty, and found against him: And it was moved in arrest of Judgment, that an Action lay not, because he doth not shew, that they were tame or reclaimed; as 12 H. 8. and 14 Eliz. Dy. for a Hawk: Sed non allocatur; for they be Merchandise, and valuable. And so it is of an Action for a Parrot: Therefore it was adjudged for the Plaintiff.

Rogers versus Head.

(26)

Assumpsit: Whereas the Defendant is a common Carrier from London to Leatherhead in the County of Kent & retorrum: And he delivered unto him 3 l. to be delivered at the Black-boy in Southwark; that the Defendant in consideration præmissorum, and for that the Plaintiff did undertake rationabiliter to content him for the carriage, promised safely to convey it thither, and to deliver it at the said sign to the Plaintiff; and in factis saith, he hath not done it: The Defendant pleads Non assumpsit, and found against him: And it was now moved in arrest of Judgment, that the Declaration was not sufficient to maintain the Action; First, because he doth not shew, that he was a common Carrier at the time of the delivery, but that he now is; and unless he were a common Carrier, he cannot charge him but by a special Action; But here he chargeth him upon his promise; wherefore it is not sufficient: For the Consideration that he would rationabiliter content him for the carriage, not promising any certain Summe, being uncertain, is void; as primo Maria Dy. to sell so many trees as may reasonably be spared, is a void Contract: Sed non allocatur; for the Consideration is sufficient, because a Carrier may

may demand as much as is reasonable, and the other is bound to pay it; and it is the usual course to appoint a Taylor to make a garment or a Smith to shoe his horse, and that he will content him, such a contract is good enough; and it hath been adjudged in this Court between *That if one promise so much for his Tabling, as it shall be reasonably worth, with an averment that he so many weeks Tabled with him, which is worth so much every week, it is good enough: So in the principal Case it was adjudged, that the Action lay upon that promise, but not because he was a Common Carrier.*

1 Cr. 77.
3 Cr. 149.
Post. 370.

Sir William Wrey *versus* Vesper.

Action upon the Case: Whereas the Major and Burgesses of Liskarrel in the County of, &c. were leased in fee of three water-mills in Liskarrel prædict. And that the said Major and Burgesses, and all those, in the said Mills for them, their Tenants and Farmors, time whereof, &c. have had their Water-courses running from a place called Hederbridge, in parochia de Liskarrel prædict. usq; the said mills, to serve them with water to grind Corn; and that such a day and year they demised unto him the said mills for 21 years; and that he being so possessed, the Defendant 1 Octob. 5 Jac. apud Liskarrel prædict. between Hederbridge aforesaid and the mills, in a Close wherein the mills are erected, and where the water-course used to run, digged a trench, and diverted the said course of water, whereby it came to pass, whereas he used to grind every week 30 quarters of Corn, he could now grind but only ten quarters, &c. The Defendant pleaded Not guilty, and found against him: And it was now moved in arrest of Judgment, First, that the prescription is not good; for that it is for them, their Tenants and Farmors, and he doth not say eorund. molendinorum: Sed non allocatur; for it is to be so intended, and not that he was Farmor of any other thing. Secondly, that the Venue was from the Will of Liskarrel, where it ought to have been from the Parish of Liskarrel; for the water-course is alledged to be current from the place called Hederbridge in parochia de L. prædict. and the stopping is between Hederbridge and the mill, &c. Sed non allocatur; for the Parish of L. and the Will of L. are intended to be all one, and Hederbridge is but a place known, and no Will by intendment: Wherefore it was adjudged for the Plaintiff.

Hob. 6.
Post. 274, 341;
676.
1 Cr. 151.
3 Cr. 837.
Ant. 120.
Post. 586.

Oshey *versus* Sir Baptist Hicks.

Covenant upon an Indenture dated the ninth of Octob. 38 El. wherein was recited; Whereas by Indenture of Charter-party

(28)

party dated 8 Septemb. 38 Eliz. between the Plaintiff and Francis Cherry; The Plaintiff having hired of him a Ship for a Voyage to Dantzick for Corn; upon taking the Ship, it was agreed between them, that the Ship should be laden with Corn, to Dantzick, and to sail to Ligorn. Now by the said Indenture, upon consideration the Plaintiff had agreed that the Defendant should have the moiety of the Corn quod tunc fuit, or afterwards should be laden in the Ship in the said Voyage, the Defendant promised to pay the moiety of the money for the said Corn quod tunc fuit, or afterwards should be laden, &c. And alledged in fact, that upon the ninth of Octob. 38 Eliz. the Ship was laden with 60 Lastes of Corn; and for not performance of this Covenant brought the Action: The Defendant pleaded, that the Deed was sealed and delivered the 28 Octob. 8 Eliz. Et quod ad tunc vel postea there was not any Corn laden there; and traverseth the delivery thereof 9 Octob. or at any time afterwards before the 28 Octob. 38 Eliz. And it was thereupon demurred, and argued by Yelverton, that the Plea is not good to traverse the time of the delivery; for if there were Corn in it. 9 Octob. which was the date of the Deed, he ought to answer thereto, and satisfy for it, although it was not laden 28 Octob. 38 Eliz. (for the truth is, the Corn was cast away between the ninth and 28 of Octob.) for that hath reference to the date of the Deed, as to their agreement, especially when two times are mentioned in the Deed, and all the Covenants are referred to the time of the Agreement; and for proof thereof he relied upon 32 H. 6. 16. But against that it was argued, and so resolved by all the Court; that in regard he declares upon a Deed dated 9 Octob. 38 Eliz. It shall be always intended to be delivered, and to have his Essence at that time, and at no other; and if he would afterward confess it to be delivered at any other time, it is a departure from his declaration, as 5 H. 27. primo Eliz. Dy. 167. 1 H. 6. 4. & Coke lib. 5. fol. 1. And the words of the Deed, That he should pay for the Corn then laden, or afterward to be laden therein; this word tunc, is referred to the time of the Essence of the deed by the delivery, and not to the date: For if it were delivered ten months after the date, he should not have any benefit of the Corn laden, and spent, or sold before the time of the delivery: Therefore he shall not be charged with it for the time before the delivery: And Fleming said, if one Covenants that I. S. shall have all his trees now standing, it refers to the trees standing at the time of the delivery; and if any be sold after the date, and before the delivery, he hath not any remedy for them: Wherefore the Plea and the traverse are good: And it was adjudged for the Defendant. Vid. Dy. 221, 307. & Plowd. Adams & Wrothleys Case; ad tunc in tenura VVilcocks.

Anr 126.
Post. 285, 645.

Co. Lit. 468.

Dyer 139. a.
3 Cr. 14.

Hayward *versus* Hayward.

ERror a of Judgment in the Common Bench: The Error assigned was; For that the Defendant being an Attorney in the Common Bench, and sued by bill, appeared and pleaded in proper person; and being at Issue, the Record of the Nisi prius was, Quod tam prædict. le Plaintiff, quam Defendens, appeared per Attornatos infra nominatos; and the Verdict passed for the Plaintiff, and Judgment for him; whereas the Defendant could not appear per Attornatum infra nominatum, there being no Attorney in the Record for him; and that was held to be an Error, if the Record was so; because the parties ought to appear in person, or by Attorney, where the Inquest is to be taken by default: But the truth was, the Defendant appearing in proper person, It being but a mis-entry of the Clerk; it was therefore awarded to be amended, and the Judgment affirmed. (29)

Post. 369.

William Lewson *versus* Kirk in the Exchequer.

Action upon the Case: Whereas the Plaintiff is, and for 20 years last past was, a Citizen and Merchant of London, using Traffique into the parts beyond Sea; and the 20 May 32 Eliz. took his journey from London in partes transmarinas to merchandise, and the same 20 April 32 Eliz. apud London in the Parish of Aldermanbury in Ward. de Cripplegate, did trust and appoint the Defendant as his servant to receive in his absence, and when he should be in his journey, all merchandises of the Plaintiffs, to the Plaintiffs own use, or what by way of merchandise should be brought from beyond Seas, or consigned unto him, and to pay the Customs and Subsidies for them due or payable, and to dispose and convert them to the use of the Plaintiff: And that the same day he took his Journey accordingly: And that the 9 April 32 Eliz. in his absence twenty pieces of Velvet of the value of 800 l. were consigned by one Martin Billingsley his Factor, being in Stoad beyond Sea, to be delivered in England, which by way of merchandise were brought into England, to a Port of London in the Parish of Saint Peters juxta Pauls Wharf in the Parish of Queenhithe, in a Ship called the Dolphin: That the Defendant having notice thereof, and knowing that Subsidie was due to the Queen for them; and if they were landed, the Subsidie not paid or agreed for, That they thereby were forfeited, and might be seized; the Defendant intending to deceive the Queen of her Subsidie, and notwithstanding to deduct the allowance from the Plaintiff of so much as should be due for the Subsidie, as if it had been paid, the said 9 Apr. 32 Eliz. in the said Parish of Saint Peters, and Ward of Queenhithe;

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caused

(30)
2 Rol. 613. 4.

caused the said goods to be unladen, and put to land, the subsidy for them due being not paid, nor the Collector agreed with, &c. Whereby the said goods were forfeited to the Queen, and then and there seised by one Tho Gardiner, and an Information brought in the Exchequer for that cause; and there adjudged, that they should remain forfeited to the Queen; Whereupon he lost all the profits of them; for which, &c. The Defendant pleaded Not guilty, and found against him, to his damage of 250 l. And thereupon moved in Arrest of Judgment, that an Action upon the Case lies not, by reason of the confidence or trust reposed in him as his servant: Because it is not alledged, that he had any money left with him to pay the subsidy, and then he is not bound to pay it: But it was thereto answered; That in regard he was trusted with all the goods to Merchandise and dispose of to his Masters profit; Therefore by intendment he had means sufficient to satisfy the Custom, &c. For he might agree for the Custom, and afterward take and sell the said goods, and then pay the Custom: And for a second reason the Action well lies; For he is chargeable, because he caused the goods to be taken out of the Ship not Customed, whereupon they became forfeited; And if he had not wherewithal to pay for the Custom, he might have let them alone within the Ship, and not have medled with them: Wherefore although he had been a stranger, he had for this cause been chargeable; A multo fortiori, being a servant, and doing it by colour of Authority: But it was said, that then this being a meer Tort, the Action lies not, but Trespass vi & armis: And to that opinion the Barons at the first inclined; But having considered thereof afterward, all the Barons beside Snigg conceived, that the Action well lay for the special loss which the Plaintiff had by this Male fessance, although the Defendant had been now taken as a stranger: Also although it is alledged, that he did that in his absence, the Plaintiff being beyond sea, yet the Plaintiff may well have a general Writ of Trespass, or his special Action upon the Case, as here, 43 Ed. 3. 3. N. B. 93, 94. But then it was moved, that here was a mistrial; for this Action being now maintained against him for his Male fessance, in taking the goods out of the Ship, which is in the Parish of St. Peters in Ward. de Queen

2 Rol. 613. 4

An: 191.

Hiche; The Ven. fac. ought to be from that Venue and Parish only; and it was awarded as well from that Parish and Ward, as from the Parish of Aldermanbury and Ward of Cripplegate; and being made of two Parishes and Wards, where it ought to have been of one only, It is as well a mistrial as when it is of one Will, where it ought to be of two: And of that opinion were all the Barons, that for this cause it was a mistrial: Wherefore a Ven. fac. de novo was awarded; and this Issue was tryed again, and damages found to 400 l. and Judgment for the Plaintiff.

Thomas Rich *versus* Holt, Hill. 7 Jac. Rot.

Action for words: Whereas he being peritus in lege, and had been a Counsellor at the Common Law for ten years; that the Defendant 16 Decemb. 6 Jac. at Withington in the County of Gloucester, in the presence and hearing of divers, de eodem Tho. spake these words, viz. You are a paultry Lawyer, and use to play on both hands: And of his further malice, &c. the 18 Septem. 7 Jac. apud Tewksbury in Comitatu Gloucester (before Doctor Seaman Chancellor of the Bishop of Gloucester, and other the Commissioners of the Archbishop of Canterbury, in his Visitation; the said Plaintiff giving them Information of certain Misdemeanors of one Thomas Knowls Parson of Withington) spake to the Chancellor de eodem Thoma these words, viz. Mr. Chancellor, I hope you will not believe Mr. Rich, (ipsum Thomam modo querentem innuendo) for he is a furtherer and maintainer of Felonies; the Defendant pleaded to all those words, except to those, you play on both hands, Not guilty, and quoad those, Justifies: For that the Plaintiff at Withington, aforesaid, devised certain Articles against one Thomas Knowls Parson of Withington, concerning divers Misdemeanors supposed to be done by him; and that the Plaintiff afterward, viz. 11 September 6 Jac. at Cicester in the County of Gloucester, concerning the said Articles, then and there promised the said Tho. Knowls, that he should not any further be molested by the said Articles; and further said, That afterward, viz. 16 September Jac. he speaking with the Plaintiff concerning the said Articles, told him, he had promised the said Thomas Knowles, That he should not be molested by reason of the said Articles, and yet notwithstanding endeavoured by the solicitation and procurement of Richard Lawrence and D. L. to prosecute him upon the said Articles before the Chancellor and Commissioners of the Archbishop of Canterbury in his Visitation: Whereupon he said to the Plaintiff, you play on both hands, *Come bien auy list*: the Plaintiff thereunto replies, *de son tort demesle, sans tiel cause*; whereupon they were at Issue, upon both Issues; and a Ven. fac. awarded from Withington and Tewksbury; and the Jury found quoad these words, you are a paultry Lawyer, and use, &c. And quoad the other words, to M. Chancellor, I hope you will not believe M. Rich, for he is a smotherer and maintainer of felonies mentioned in the first issue, that the Defendant is guilty, and assess damages to 6 l. 13 s. 4. d. and quoad the other issue they found it for the Plaintiff, and assess damages to 6 l. 13 s. 4 d. And it was thereupon moved in arrest of Judgment, that for the words in the first Issue, they are not actionable; for the words, you are a paultry Lawyer, by themselves, will not maintain an Action; and the words, he is a smotherer and maintainer of Felonies, do not touch him in his profession; and he being but a private person, and no

Justice of Peace nor publick Officer, an Action lies not for them. Also the words found to be the same words which were in the Declaration: Sed non allocatur; for all the Barons held, that the words are all one with the Declaration, although they be otherwise coupled, by reason of the Defendants Plea; also that the first words be not actionable; but the last words, he is a smotherer, &c. are of great discredit to any man, though he be not a Magistrate, and are actionable: And therefore Tanfield Chief Baron said, it was adjudged in the Case of Sir Henry Lea, for saying he was a maintainer of Felons; although it were not alleged that he knew them to be Felons, or that he was a Justice of Peace, that the words were actionable; A multo fortiori, when he saith, that one is a smotherer and maintainer of Felonies, which cannot be without Conusance of them. Exception was also taken to the tryal of the second Issue, because the Ven. fac. was not as well from Cicester as from the other Mills; there being matter of Justification in the Issue: Therefore it was a mistrial; and as to that the Barons doubted; for they held, that the Plea was ill, so as the Plaintiff might have demurred upon it, yet the Issue being joyned upon an ill Plea, the Tryal shall be from that place where the Justification ariseth; and therefore they advised the Plaintiff, in regard there were several Issues, severally found, and severall damages assessed; that he should take his Judgment upon that which was clear and duly tryed, and relinquish the other which was doubtful, for doubt of Error; which he did accordingly.

Ant. 59.
Post. 629.

Ant. 95.

Termino

Termino Hillarii,

Anno octavo J A C O B I Regis in Banco Regis.

Doctor Trevors Case.

Note: It was resolved by the opinion of the Justices, upon a (1)
reference unto them by the Lord Chancellor in the Case of *s E. 6. cap. 16.*
Dr. Trevor, for the Office of Chancellorship of Landaff;
That the Offices of Chancellor, Register, and Commissary, in Eccle-
siastical Courts, are within the Statute of *5 Ed. 6.* For although
they concern matters principally *pro salute animarum*, yet they also
concern matters about Matrimony and Legitimation, which touch
the inheritance of the Subjects, and about matters of Legacy for
Chattels real and personal: And in that respect are Courts of Ju-
stice: And therefore the Offices in those Courts, are as well Offi-
ces intended within the said Statute of *5 Ed. 6.* which restrains
the buying of Offices, as any other Offices in the Courts of the
Common Law.

Roberts Case.

Roberts had a Prohibition in the Common bench, unto the (2)
Court Christian in a Suit for Subtraction of Tythes, *3 Cr. 666.*
and surmisseth, that the Plaintiff (now Defendant in the Spi- *Yelv. 135.*
ritual Court) had but one Witness to prove a Lease of the Tythes, *Ant. 217.*
which was not there allowed, because it was *singularis testis*; and
a president, Hill. 38 Eliz. in Banco Regis shewn, That for this
Cause a Prohibition was granted: But upon adviseement in
this Case by Coke and all the Justices, it was resolved, that
consultation should be awarded; First, because there is a rule
in the Register, That where *Cognitio principalis* is, there
Cognitio accessaria necessarily follows: And so is the Book of
1 Ed. 4. Secondly, if such surmise should be allowed in every
Case, it would oft-times be made for meer delay, and the Spi- *Yelv. 92.*
ritual Court should not try the accessory as well as the prin-
cipal: And Coke Chief Justice cited a notable president,
Pasch. 35 Eliz. between Futter and Whiskin, where Futter
brought a Prohibition in the Kings Bench, supposing that he
was owner of the Rectory of Longham in Norfolk; and li-
belled against Clement, for the Subtraction of Tythes, in
which Suit Whiskin came in *pro interesse suo*, and claimed it
by Patent from Queen Elizabeth to one Hall, who intressed
Bolyu,

Bolyn, who lets for years to Whiskin; and Futter claimed by a former feoffment made by Hall to Sir Edward Cleer; and pretended, that he proved it by one Witness, and that in the Spiritual Court: They would not allow it; and for that cause prayed a prohibition: And VVhiskin upon consultation affirmed, that he claimed by a deed of feoffment of the Rectory, and proved the deed, but could not prove the livery and seisin; for which cause they sentenced against him; and traverleth, that he denyed to allow of it, being proved by one Witness, if he did not prove it by another Witness: and thereupon Futter demurred, and it was objected, that this is matter tryable at the Common Law, whether feoffment or not; Therefore the Spiritual Court shall not intermeddle therewith; for Inheritances ought to be tryed by the Common Law, and not by the Spiritual Court, where they have another manner of tryal: And although there is a text in the Civil Law, that unus testis is as nullus testis, yet unus testis with other circumstances shall be allowed; and if it be not, yet it shall not be redressed by the Common Law, but by appeal; and if they proceed invito ordine, it shall be redressed by appeal; and when the Original cause belongs unto them, although matter tryable at the Common Law ariseth, depending upon the Original cause, yet it shall be determined in the Ecclesiastical Court; and such surmise, that he hath but one Witness, is not sufficient to have a prohibition, where the Ecclesiastical Court hath Jurisdiction of the Principal; for if such a surmise should be sufficient, all Suits in the Ecclesiastical Court should thereby be stayed, or otherwise taken away; and the Plaintiff in the Spiritual Court could not have answer thereto.

Post. 351.

Hob. 188.

Hawes *versus* Leader.

(3)
Yelv. 196.
St. 13. El. c. 1.

DEbt against the Defendant as Administrator of Thomas Cookson; Wherein the Case appeared to be: That the said Thomas Cookson, for 20 l. paid by the Plaintiff into his hands, upon 9 the February 2 Jac. granted all his goods mentioned in a Schedule annexed to the deed, and gave possession of them by a Pewter dish, with a Covenant, that he, his Administrators, &c. should safely keep and quietly deliver them unto the Plaintiff upon his demand; and bound himself in 40 l. to the Plaintiff for the performance of that Covenant: Thomas Cookson afterwards died, and upon the 16 March Anno 6 Jac. the Plaintiff demanded the goods of the Defendant being his Administrator, who would not deliver them; whereupon the Plaintiff brought this Action: And in his declaration shews in specie what goods were contained in the Schedule. The Defendant pleaded the Statute of 13 Eliz. cap. 5. of fraudulent deeds and gifts, &c. And further saith, That Cookson the Intestate, 12 Februar. 2 Jac. was indebted to divers persons in several sums (naming both

both the persons and summs) amounting to an 100 l. and being so indebted, upon the 19 Februar. 2 Jac. made the Deed of gift aboves mentioned, being then of those and other goods possessed to the value of 80 l. and no more: and that it was made of fraud and Covin betwixt Cookson and the Plaintiff, to deceive his Creditors named: and how that Cookson, notwithstanding the Deed of gift, used and occupied all the goods during his life; and that Administration after his death was committed to the Defendant. The Plaintiff replies, That the Defendant had Assets in his hands, to satisfy the debts demanded, and that the Deed of gift was made upon good consideration, &c. Whereupon they were at Issue. And at Huntington Assises, Cook refused to try it, because the Issue was not well joyned; and a Repleader was ordered: Upon which the Defendant pleaded *Ut supra*; and the Plaintiff demurred. First, because the Defendant has not averred in his Bar, that the debts due were unpaid to the Creditors named. Secondly, because he did not shew, that the debts to the supposed Creditors, were due by speciality; for otherwise the matter of his Plea is not good: Because the Defendant cannot plead such a Plea, but to excuse himself of a *Devastavit*, which could not be in this Case: For an Administrator is not liable to debts, if they be not upon speciality. Thirdly, the Defendant supposed it would be a *Devastavit* in him if he should deliver the goods to the Plaintiff, which were contained in the deed of gift; which is not so: For those in the Plaintiffs hands are liable to the Creditors, as an Executor *de son tort* demeaseth, if the deed of gift be fraudulent. Fourthly, it may be the Creditors will never sue for their debts, and then the Defendant might thereby justify the detainer of the goods for ever; which would be inconvenient. Fifthly, the Defendant is not such a person as is enabled by the Statute of 13 Eliz. to plead that Plea; for the Statute makes the deed void as against the Creditors, but not against the party himself, his Executor or Administrators; for against them it remains a good deed: It was therefore adjudged for the Plaintiff.

Farmor versus Hunt.

(4)
TRESPASS for chasing the Plaintiffs Cattel in such a Close; Yelv. 201.
 the Defendant justifies as Damage-feasant in his Freehold: The Plaintiff replies, and shews a grant of Common in the place where, by the Defendant to the Plaintiff (but saith not *hic in curia prolata*) and afterwards the Defendant erected a Reek of Corn there, and that the Plaintiff put in his Cattel to use his Common, and the Defendant chased them. And it was resolved by the Court, that the Defendant erecting a Reek of Corn upon the Land where the Plaintiff had right of Common, though the Plaintiffs Cattel eat the Corn, yet the chasing of the Cattel is not

Roll. 57501

9, 3.

3.
M. 433.

not lawful; for then it would be in his power to defeat his own grant by diminishing the Plaintiffs Common, which he ought not to do; for the Plaintiffs Cattel are without restraint to range over the whole place; and the wrong first beginning on the Defendants part, who was the grantor; he shall never take advantage thereof for the Trespas done unto him by the Plaintiff: But because the Plaintiff did not shew to the Court the Indenture of Grant, which is the ground of his Title, Judgment was given against him.

Hampton versus Courtney.

(5)

ERror brought to reverse a Judgment in an Action of Debt: where Bail being entred for the Defendant, Judgment was given for the Plaintiff. The Error assigned was, That the Entry of the Bail was sub poena Executionis, in adjudicatione Executionis; so as it was entred for the Execution only, and not for the Judgment; whereas it ought to have been sub poena condemnationis: And thereupon the Court was moved to have the Bail discharged: Sed non allocatur; for the Bail being once taken, stands as well for the Judgment as for the Execution; and they ordered it should be amended, and made to be sub poena Executionis Judicii as well as for the Execution.

Termino

Termino Paschæ,

Anno nono JACOBI Regis in Banco Regis.

Bond *versus* Bayn and his Wife.

Assumpsit : Whereas one B. was indebted unto him in 60 l. which he had lent to the said B. And being so indebted, made the *Feme* his Executrix, and intreated her to pay that debt, and died ; That she proved the Will, Et prætectu Testamenti prædicti fuit possessionata of a Lease for years of such a house : And in consideration that the Plaintiff should not sue nor molest her (being Executrix) for this money, and would give unto her a quarters day, viz. unto Michaelmas next following, she promised to pay it, &c. Upon Non assumpsit pleaded, and found for the Plaintiff, it was moved in Arrest of Judgment, that the Action lay not against the Executrix ; for the debt being upon a Contract, and no special promise, no Action lies against the Executrix. Also it is not averred, that she had *Assets* in her hands ; and there is not any cause of consideration to make that promise. And although it be alledged, that she was possessed of that term prætextu testamenti, yet it doth not thereupon follow that she had *Assets*, for she might have it in satisfaction of debts which she had paid, or is chargeable for debts upon speciality more than that comes to. But notwithstanding, without much Argument it was adjudged for the Plaintiff ; for the Loan implies a promise, and the Executrix is chargeable therewith ; and this Action is grounded upon her promise ; and being alledged that she had the term, it shall be intended she had it as *Assets* : And his forbearance of suit, and her having of *Assets*, are the causes of this Action : Wherefore it was adjudged for the Plaintiff.

(1)
Co. 9. 93. b.

Moor 854.
Post. 294.
Ant. 47.

Co. 9. 94. a.

Lawrence *versus* Johns.

(2)
Ant. 248.
Jones 229.

DEbt upon an Obligation of one thousand Marks, conditioned, whereas he was presented to the Church of Stretham in the Isle of Ely, that if he resigned the Benefice within a month after request made unto him, viz. at the Parsonage-house of Stretham; That then, &c. The Defendant pleads Non requisivit, and found against him, and adjudged for the Plaintiff: And Error thereof brought and assigned; First, for that the Plaintiff alledgeth a request, viz. at the Parsonage-house of Stretham; whereas it being the place of request, ought to have been alledged precisely, and not under a viz. &c. Sed non allocatur; for that is the usual course. Secondly, because a request is alledged, and it is not shewn that he gave notice of the time of the request to the party; or that the party was present: Sed non allocatur; for being alledged to be made unto him at the said place, it is to be intended, he was present there: And being found precisely to have been made, therein is included, that he was present, and had sufficient notice given him; otherwise they ought not to find the request. Thirdly, because the Ven. fac. was de Stretham; it not being named as a Village or Hamlet, but rather as a Parish: Sed non allocatur; for the Parsonage-house of Stretham is intended to be a Village: And a Parish and Village are intended all one, if the contrary be not shewn. Fourthly, it was moved that the Bond was made for Simony, it being to compel him to resign: Sed non allocatur; for it is not Simony, but good policy to tie him to resign; and if it were, it is not material: wherefore the Judgment was affirmed.

Ante 263.

1 Cr. f. 180.

Holbrooke *versus* Dogley, Mich. 8 Jac. Rot. 232.

(3)

Error of a Judgment in Ejectione firmæ against four, whereof one was an Infant, and appeared by his Guardian: And upon Not guilty pleaded, and found for the Plaintiff, Judgment was against them, quod capiantur; and the Error assigned for that cause; for no such Judgment ought to be against an Infant, nor ought it to be, that he should be imprisoned; It was therefore reversed: Although it was moved by Dampport, that where vi & armis is in any Action against an Infant (for that it was *de son tort demesne*) there a Capiatur shall be the Judgment against him; but the opinion of the Court was otherwise: Wherefore it was reversed.

Post. 290.

The Lady Platt *versus* Sleaf.

Ejectione firmæ, Of Lands in St. Albans, tryed at the Bar : (4)
 Upon Not guilty pleaded, and opening the evidence for the
 Plaintiffs Title, these points did arise ; a Lease for years was
 made on Condition to be void upon payment of 6 d. The Les-
 see enters, and assigneth his interest to a stranger, who is dis-
 seised ; afterwards , the Lessor payed the 6 d. according to the pro-
 viso : And it was holden for Law ; That although the Assignee
 was outed by a stranger, so as the Lessor had but a right at the Post. 300.
 time of the payment, yet the payment was good enough to deter-
 mine that Lease ; for the payment is a thing collateral : Second-
 ly, it was resolved upon the evidence, where the Baron in this
 Case had a Term for years in his own right ; and the Inheri-
 tance afterwards descended to his Feme ; that, coming to him in
auter droit, should not drown and extinguish the Term for years Co.Lit. 338. b
 which he had, and was possessed of in his own right, and so he
 might well assign over or dispose of this Term at his pleasure,
 notwithstanding the descent of the Inheritance to his Wife ;
 Whereupon the Jury found for the Plaintiff : And upon this
 point in Law, the Court was afterward moved to stay Judg-
 ment : And Williams said, that upon better advisement and con-
 sideration of the Case, he conceived clearly, the Baron having
 the Term in his own right, and the Inheritance descending to his
 Wife (so as he had a Freehold in her right) that the term was
 drowned, and could not be assigned over. But the rest of the
 Judges were of a contrary opinion ; for this Case is not like Bar-
 cebridge and Cokes Case in Plowd. Comment, where the Baron Pl. C. 418. b.
 had the Fee and Freehold in his own right, and the term in the
 right of his Feme ; and however, if the Counsel for the Defen-
 dant had not been satisfied at the Trial with the directions which
 the Court then gave the Jury, they should have prayed, That the
 matter in Law might have been found specially ; for now the Ju-
 ry having given a general Verdict, were thereby concluded ; and
 Judgment ought to be given according to the Verdict, which
 was so entered for the Plaintiff.

Berisford *versus* Prefs.

Action for words : Mr. Berisford (innuendo the Plaintiff) hath
 spoken Treason, and that I will prove : The Defendant plea- Yelv. 297.
 ded, that he spake other words, and traverseth these words, and
 found against him ; and now moved in Arrest of Judgment, that
 these words be not actionable : For there is no express affirma-
 tion that the Plaintiff is a Traytor or had committed Treas-
 on ; for then without question the Action would lie, as it was
 held

held by all the Court; for although the words be general, yet it is an exprefs charging him with matter of Treason: But when he saith, Thou hast spoken Treason, and that I will prove, that is but a mispession of the words, in conceiving such words to be Treason, which peradventure be not; and it is not an exprefs charging him with Treason: And the words, that I will prove, is quasi by way of argument, which is not to be taken in so ill part, as where he chargeth him to be a Traytor: And a president was shewn, 5 Jac. in this Court, betwixt Blanchford and Atwood, where an Action was brought for these words, I will hang him, for he hath spoken Treason: But it was answered, That that was not like to the Case in question; for where he saith, I will hang him, for he hath spoken Treason, there it is a direct affirmative that he had spoken Treason, for which he is to be hanged: But this is no precise affirmative, but is quasi argumentative, saying, viz. I will prove that which you have spoken is Treason: And if it be not so taken, it is not actionable; and when words be doubtful, they shall be taken in mitiori sensu; and of this opinion were Yelverton and Coke Justices; but Williams and Fenner conceded there was not any difference betwixt the Cases, and that the words are actionable: But Fleming seemed to doubt; afterwards he, by the assent of the parties consented, That Judgment should be entred for the Plaintiff, and that he should take 20 l. for Costs and Damages, and Release the residue, and so it was done; the Damages given by the Jury being 60 l.

Thorneys Case.

(6)

THorney was Indicted upon the Statute of 8 H. 6. in this manner; Inquisitio capt. apud Surfleet coram A. & B. Justic. pacis, &c. In partibus prædict. per Sacramentum, &c. Exception was taken, because it doth not appear, that Surfleet where the Inquisition was taken, is in partibus Hollandiæ, otherwise the Inquisition is taken without Authority: For in the County of Lincoln are three divisions, and three several Commissions of the Peace, so as the one hath not to do with the other, viz. the parts of Holland, the parts of Kesteiven, and the parts of Linsey; and because it was not shewn that Surfleet was in the parts of Holland, it was moved to be ill, and a president shewn, Trin. 5 Jac. Rot. 43. where one Heath was Indicted in Comitatu Eborum, in the West Riding, and the words as here; and for this Cause ruled to be ill, and discharged: And so, in this Case held Groke, Yelverton and Fenner; but Williams and Fleming Chief Justice doubted; yet at length, upon view of the pre-

president, they agreed, that the Indictment should be discharged, if the Record with the Clerk of the Peace was so: Wherefore it was commanded, that he should bring in the Record it self to be viewed; for it was urged, that no other Certiorari can be awarded in this Case: But if they upon view of the Record found it to be a mispision in the Certificate, they should cause it to be amended.

Smith *versus* Henry Skipwith, Pasch. 8 Jac.

Rot. 153.

ERror of a Judgment in the Common Bench: The Error assigned was (the Judgment being for the Defendant) (7) That there was not any Warrant of Attorney for the Plaintiff; and Certiorari being awarded, it was returned, that there was not any Warrant of Attorney in that Term wherein the Action was commenced, and Judgment given: Whereupon there were two Scire facias sued, and returned Nihil, and the Record was marked, that it should be reversed, but the Judgment was not entred upon the Roll; which the Defendant in the Writ of Error surmised to the Court, ut amicus curiæ (for he could not plead that there was Warrant of Attorney for another Term) and prayed a new Certiorar. And it was held by all the Court, That he might well have it; for otherwise, by the false surmise of the want of an Entry of a Warrant in one Term (where peradventure it is in another Term) it should be reversed; and it is not material in what Term it be entred, so it be entred at all: Wherefore it was granted, and commanded that the Entry upon the Record of the Reversal should be stayed until it was certified; and thereupon the parties compounded.

Ant. 6.
Ant. 131.
Post. 294, 369.

Sallows *versus* Girling, Pasch. 8 Jac.

Rot. 64.

DEbt upon an Obligation, Conditioned to stand to the award of A. B. C. and D. of all Actions and Demands between them, so as the said Arbitrators or any three or two of them did make the said award under their Hands and Seals before such a day. The Defendant pleads, that neither they nor any three or two of them made any award or arbitrement: The Plaintiff shews, that two of them made an award under their Hands, viz. That the Defendant should pay to the Plaintiff 3 l. at such a day, and that the one should release to the other all Actions and Debts, except Obligations made for performance of former awards; and for non-payment of the said (8)

Yelv. 203.

Post. 400.

Ant. 200.

Post. 400.

Post. 352.

said 3 l. he brought this Action: Whereupon it was demurred; and whether this award by two be good, (because the first part of the Condition is, That all the submission is to four, and not to three or two of them, which only comes under the So as) was the question: And all the Justices conceived it to be good enough; for it is an explanation of the former part, and as well as if it had been inserted therein; for all shall be expounded together, and to make one entire Clause, and to shew how they shall have their authorities. Vid. 2 R. 3. fol. 18. 22 Ed. 25, & 26. Fleming Justice doubted thereof; for he held, that So as implieth as much as that two only are necessary to put their Hands and Seals; but all four ought to make the award. The first Exception was, because they did not make the arbitrement of all matters submitted unto them, but excepted, that they would not meddle with former awards and former Bonds: And when Arbitrators do not make their award of all things submitted unto them, but refuse to meddle with part, it is a void arbitrement, as 4 Eliz. D. 216. But it was then answered, If the Defendant would take advantage thereby that the Arbitrators refused to intermeddle with any matters submitted unto them, he ought to have shewn it by way of Bar, That such things were submitted and notified unto them, and that they did not make any award concerning them, otherwise the Court shall not intend that they had notice of any such matters; and although they excepted, that they would not meddle with any Bonds, for the performance of former arbitrements, non constat that there was any Bonds, because it is in the generality. And so is Baspoles Case Co. 8. Rep. fol. 98. a. And of this opinion were all the Justices, besides Fleming, for he doubted thereof, because they excepted therein their award; and it is not to be intended, that they would have excepted them, unless there had been such: But for another reason he conceived it to be well enough; for their award therein is, They awarded, that they excepted, &c. which is as much as to say, they awarded that they should stand in their force, which is a good award; wherefore it was adjudged for the Plaintiff. Vid. 2 R. 3. 18 H. & 22 Ed. 4. 25, 26, 27. Note, A Writ of Error is brought upon this Judgment in the Exchequer-Chamber; and this point was assigned for Error; but it was resolved to be well enough: For the words subsequent explain it, that it may be made by two or three of them; but because it was shewn, that the Arbitrement was under their Hands, and doth not say under their Hands and Seals: For this cause it was reversed.

Love *versus* Naplesden.

Prohibition : Whereas one Richard Bent was seised in Fee of certain Lands in D. and possessed of a Lease for years of Lands in D. for divers years yet to come ; and devised all his Lands and Leases to Thomas his Son and Heir (whom he made Executor) excepting 20 l. per annum for seven years, to be employed in this manner, viz. a hundred pound to his Daughter Elizabeth to be paid within five years, and thirty pound to his Daughter Mary within seven years : And in Ann. 1600. died. Thomas entred, and took the profits as well of the one as of the other, for the seven years, and died ; and made Mary his Feme (now wife to the Defendant) his Executrix, and left *Assets* unto her : Whereupon the said Mary the younger Daughter sued her for that Legacy of 30 l. and now they brought a Prohibition, surmising that this Legacy being out of the profits of Land, no suit could be in the Ecclesiastical Court for it. But in regard it was a mere personal Legacy, although it is to be raised out of the profits of Land, yet being raised out of the Lease for years, as well as out of the Land ; and he having raised it, and being dead without payment, there being no Action maintainable for it at the Common Law by account against his Executors, or otherwise ; It is therefore reason she should have her remedy in the Spiritual Court : Whereupon a Consultation was awarded by all the Justices besides Williams, who doubted thereof. Vid. Dy. 151. and 9 Eliz. 164.

(9)

John Mackaleys Cafe.

Sir John Murrey, John Mackaley, and John English, were indicted at Newgate Sessions, for the murder of one Fells, Serjeant of the Mace in London. The Indictment was special, shewing the custom of London for any Serjeant to arrest after a Plaintiff entred in any of the Courts of the Counters : And that one Radford caused a Plaintiff of Debt to be entred in the Counter of Woodstreet against Sir John Murrey, and procured the said Fells to arrest him ; who 18 Novemb. 8 Jac. between five and six of the clock at night, being Sunday, within Ludgate came to Sir John Murrey, and clasping him about the middle, said, I arrest you in the Kings Name at the Suit of Radford, for such a Debt, having his Mace at his back, but did not shew it : And there were three other Officers to assist him, but none of them had any weapon ; and Murrey and he falling down together, the said Sir John Murrey called to the others, being his Servants, and said, Draw Rogues : And the said Mackaley and English drew their weapons ; and the said Mackaley thrust the said Fells with his sword, giving him a wound, whereof he instantly died : And all this

(10)
Co. 9. 61. b.
65. b.

this matter being found by special Verdict (which was in effect no more than the Endowment, but with the addition of these matters of fact) all the Justices of England met several times at Serjeants Inn by the Kings special Commandment, and at three several days heard Counsel, as well for the Prisoners, as also for the City (for it concerned all the Arrests in London) it being pretended that such a Custome was not good; and that the Arrest in the night, and without shewing of the Place, was not good; and other like exceptions taken to the Endowment. But after great deliberation it was resolved, that the Indictment was good, and that the custome was good, and that the offence was Murder: And now at the Sessions after the Term, Coke, Chief Justice of the Common Bench, delivered the causes of their resolutions, viz. they all resolved, nullo contradicente, that if any Sheriff, Under-Sheriff, Serjeant or Officer, who hath Execution of Process, be slain in doing his duty, it is Murder in him who kills him, although there were not any former malice betwixt them; for the executing of Process is the life of the Law: And therefore he who kills him shall lose his life; for that offence is contra potestatem Regis & Legis; and therefore in such case there needs not any inquiry of malice. The Law is the same, if any Justice of Peace, Constable, or any other Officer, or any who comes with them in their assistance, for the preservation of the peace, be slain in executing their Office, it is Murder. So if a Watchman be killed in staying night-walkers, it is Murder. They resolved also, that if there were Error in awarding of Process, or in the mistake of one Process for another, and an Officer be slain in the execution thereof, the Offender shall not have the advantage of such Error, no more than a Sheriff, who suffers a Prisoner to escape, shall take advantage of any Error thereby. But the resisting of an Officer, when he comes to make an Arrest in the Kings Name, is Murder. It was likewise resolved, that the Arrest made in the night, and also upon the Sunday was good. And lastly, they all held, that when an Officer is slain, as the case above mentioned, there needs not a special Indictment upon all the matter to be drawn, as in this Case was done, but a general Indictment, that such a party ex malitia sua præcogitata percussit, &c. And although there be not proof made of any in any precedent malice, yet the Indictment is good; for the Law presumes malice: Wherefore Judgment was given accordingly, and Mankley was executed.

Co. 9. 68. a.
1 Cr. 183,
538.
3 Inst. 52.

Co. 9. 68. a.
1 Cr. 372.

Ant. 3.

Co. 9. 66. a. b.
Post. 496.
for the
July 78
Decision
29. p. 1. c. 7.
9 m. d. 67
Co. 9. 67. a.

assumed to save him harmless from that Recognisance, &c. And the Defendant had not appeared at the Assises holden such a day at Bury, whereby, &c. The Defendant pleaded, that after the Recognisance, and before the next Assises, he obtained a Certiorari out of the Kings Bench, directed to the Justices of Goal-delivery for the said County; and that afterwards (viz.) 10 March anno octavo supradict. at the Assises holden for the County of Suffolk, this Writ was delivered to Sir Edward Coke and Williams Justices of Assise there, and was allowed: And it was thereupon demurred; and upon motion, the Plea was resolved to be ill, as well for the matter as manner thereof; for although the Certiorari removed the Recognisance, yet that doth not excuse him of his appearance, but he ought to have appeared, and procured his appearance to have been recorded; and for his non-appearance, his promise is broken; also for the manner, it is not good, because it is not alledged, that he delivered the Writ at the next Assises, and then the purchasing thereof is not material; there is not also any place alledged where he delivered the Writ, and that is issuable; for it is said he delivered it at the Assises holden for the County of Suffolk; but where those Assises were holden, non constat: Wherefore it was adjudged for the Plaintiff.

Bowles *versus* Poore, Hill. 7 Jac. Rot. 1730. in C. B.
Et Mich. 8 Jac. Rot. 384. in B. R.

(3)
2 Rol. 66, 151.

A Vowry: for that one James-Strangeways was seised in Fee, and granted a Rent-charge of 20 l. per annum to William Rabanks, to him and his Heirs during his life, and the lives of Mary his Wife, and of Dorothy and Mary his Daughters; and that Will. Rabanks died, Anno 1596. Mary being his Daughter, who married with the Defendant Peter Poore, Anno 1603. And because at Mich. 1597. there was 20 l. arrear, and not paid to the said Peter and Mary his Wife; for the Rent so arrear the said Husband distrained and adows: The Plaintiff pleaded the Statute of Usury, and found against him, and adjudged for the Defendant; and a Writ of Error being brought, The first Error assigned, was, because this Rent granted to one and his Heirs, during his life and two others, is not descendable to the Heir, nor shall the Heir be occupant thereof: But all the Court held these Limitations to be good enough; and that the Heir shall have this Rent as a party specially nominated, and as Heir by descent; although it be not properly an Estate descendable. Vid. Littleton, 168, 189. 19 Ed. 3. Account 36 Dy. 233 and 16 Eliz. Dy. 11 H. 42. Secondly, it was alledged, that the estate being limited to him for his own and the lives of two others, his own life includes as much as the lives of the others; and therefore void for the lives of the others: Sed non allocatur. Thirdly, it

Sect. 739.

Co. 4. 13. a.
Co. Lit. 41. b.

it was moved, that the Abowry supposing 20 l. to be arrear, and not paid to the said Per. Poore and his Wife: Whereupon he distrained; &c. was not good, because it appears it cannot be due to the Husband, but only to the Wife dum sola fuit; the not being married unto him until March 1603. But that was held to be but matter of form; for the abowry being for Rent arrear, to say, that it was arrear to him and his Feme, is but Surplusage; and the Issue being taken upon a Collateral matter, and the Verdict found thereupon, it shall be adjudged according to the Verdict: And although he doth not say, adhuc a retro existit, it was well enough in substance: Wherefore the Judgment was affirmed.

Co. 8. 71. a.

Ant. 251.

Post. 315.

Eliz. Bradley *versus* Banks, Mich. 8 Jac. Rot. 407.

Appeal of the death of her Husband; for that the Defendant assaulted her Husband (not having any Weapon drawn, or striking) and stabbing him; of which thrust he instantly died: The Defendant pleaded, that he was Indicted before such a Justice of Goal-delivery in the County of York, and convicted, and after prayed his Clergy; and further, to the Felony and murder aforesaid, he pleaded Not guilty: And hereupon the Plaintiff demurred and now alledged for cause; First, that the Appeal is brought of Man-slaughter, and he defends, Feloniam & murdrum; and quoad the Felony and Murder aforesaid, in the conclusion of his plea, pleaded Not guilty; whereas no murder is mentioned in the declaration, and therefore he ought to have defended feloniam & homicidium, and concluded to them, and not to the murder: Sed non allocatur; for although he pleaded to the Felony and Murder aforesaid, yet that refers to the declaration, wherein there not being ex malitia præcogitata, it is but homicide. Secondly, that the condition was not lawful, because the indictment was, that he stabbed him, having no weapon drawn, nor striking him, and so killed him contra formam statuti: whereas there is not any Statute which prohibits it, but only taketh away the Clergy from such offender; and the Verdict finding that he was guilty of the Homicide, against the Statute, is not good for that reason: Sed non allocatur: For the Indictment being framed upon the Statute, the conclusion is good, and their Verdict is pursuant thereof. But it was then moved for the Defendant, that this appeal is discontinued, because the Writ of Appeal was returnable, Quinden. Michaelis which was the 16 Octob. And the Capias ought to be awarded the same day, and to be freshly prosecuted; and the Capias bare date 23 Octob. returnable Octab. Hillarii; all which was entred upon the Roll, so seven days omitted betwixt the return of the Writ of Appeal and the awarding the Capias; therefore a manifest discontinuance: But it was thereto answered at the Bar, that

(4)

Yelv. 204.

being all in one Term (which is but one day in Law) it is not material ; also the appearance of the party aids that discontinuance : But all the Court resolved the contrary, that it is a discontinuance ; for when a Process is returned in an appeal, there ought another instantly to issue, and no mean day betwixt ; for then it is a cessation of the Prosecution, and absolutely discontinued ; and a discontinuance was never aided by the appearance or pleading of the parties. Vid. 9 Hen. 5. 2. Stamford 1. But a miscontinuance of Process, (as where one Process is awarded for another, or misreturned) may be well aided by appearance of the parties : Wherefore all the Court resolved for the Defendant, That it was a discontinuance ; and he was discharged.

Level versus Hall.

- (5) **D**Ebt upon an Obligation ; the Defendant pleaded, That the Plaintiff brought another Action upon the same Bond in London, and that the Defendant had thereto pleaded, Non est factum : And that the Jury found it was not his Deed : The entry upon the Verdict there was, That the Defendant should recover Damages against the Plaintiff, Et quod eat inde sine die, &c. But no Judgment Quod querens nihil capiat per breve ; so there was not any Judgment as to bar him in another Suit : Therefore the Court held, that the Plea was insufficient.

Termino

Termino Michaelis,

Anno nono JACOBI Regis in Banco Regis.

John Baspoole *versus* William Freeman, Trin. 8 Jac.
Rot. 1222. in B. R. Et Pasch. 7 Jac. Rot. 246. in
C. B. Quod vide in Coke lib. 8. fol. 97. a.

DEbt upon an Obligation of 25 l. dated 6 April 6 Jac. conditioned to perform the award of Francis Theobald, of all causes and controversies betwixt them; So as the award be made under his hand, and sealed before the feast of Saint Bartholemew following: The Defendant pleaded nullum fecit arbitrium; the Plaintiff shews that after the Bond, and before the said feast (viz.) 25 June 5 Jac. the Arbitrator accepted super se onus arbitrii de & super præmissa apud Lond. in Parochia & Warda, &c. & per quoddam suum scriptum arbitrii factum & deliberatum utrique partium, under his hand and Seal, ordinavit, &c. prout in the printed book: The Error assigned was in the matter in Law; but the Court without argument adjudged, That the award was good, for the reason shewn in the printed book, and would not hear any further argument concerning it; but then two other exceptions were taken: Whereof one exception was taken in the Common Bench; First, for that it is pleaded, That the 25 June 6 Jac. the Arbitrator taking super se onus arbitrii per scriptum suum, under his hand and Seal, dated the same day, ordered and awarded, &c. But he doth not shew upon what day and at what place the award was delivered to the parties; for that is issuable, and if it were not delivered unto them before the day, it is void: But all the Court held, that it is good enough; for when it is alledged, that such a day, year and place, per scriptum suum factum & deliberatum to the parties he awarded, &c. it is to be intended to be made and delivered also at the same day, and it is as good as if it had been said, ad tunc & ibid. factum & deliberatum. A second exception was taken, because the arbitrement was for such a Debt then in Controversie, which is at the time of the arbitrement made, which was after the submission; and it is not shewn in the arbitrement, nor pleaded to be in Controversie at the time of the submission; and then the arbitrement is not good; Sed non allocatur; for it shall be intended to be in Controversie, as well at the time of the submission, as at the time of the arbitrement made, unless the contrary be shewn: Wherefore for the matter

(1)

Ant. 264.
Post. 287.
352, 378.

matter in Law, notwithstanding these exceptions, the Judgment was affirmed. Vid. 20 H. 6 18. 19 Hen. 6. the 6 and 36 of 7 Hen. 6. 40. 22 Hen. 6. 39. 39 Hen. 6. 4 Hen. 6. 17. 12 H. 7. 14, 15. 8 Ed. 4. 1. Long 5. Ed. 4. 108.

Villiers Sheriff of the County of Leicester *versus* Hastings, Hill. 7 Jac. Rot. 276.

(2)

F. N. Br. 251. b.
Pl. C. 67, 68.

23 H. 6. c. 10.

Co. 10. 100. 2.

Co. 10. 100. 3.

Co. 101. 10. 2.

DEbt upon an Obligation of 100 l. The Condition was, If George Row appeared in the Common Bench, a die Pasc. in quindecim diebus ad respondendum *Thome Allen* in placito debiti quod tunc, &c. The Defendant demands Oyer of the Obligation and Condition, which being entred in hac verba, he pleaded the Statute of 23 H. 6. And that upon a Capias out of the Common Bench to take the said George Row ad respondendum *Thome Allen*, in placito debiti of 320 l. By vertue of the said Writ, the said George Row was arrested and imprisoned, until he entred into the said Bond; so it was not made according to the Statute, and therefore void: And it was thereupon demurred, and moved, that this Bond is not warranted by the Statute; first, because it is not mentioned that he should appear ad respondendum in placito debiti, nor is it according to the Writ, ad reddendum ei 320 l. For in debito generally is uncertain, because it may be in an annuity, or rationabili bonorum, or &c. Also the sum ought to be shewn according to the Writ, that the party may have Consuance to what purpose he is to answer: Sed non allocatur; for the Statute is intended only to expresse extortions and frauds in Sheriffs, and doth not prescribe any strict form of the Bond, but it ought to be made unto him only by the name of his Office, and ought to expresse the day and place of his appearance; and these circumstances being observed, although it be variant in other Circumstances, it is not material; but being for the Sheriffs profit, in Oppression of the people, the Bond it self is made void by the said Statute. Vid. 3 Mar. Dy. 119, 23 Eliz. Dyer 364. A second exception, because the Obligation is for 100 l. being for an appearance only; whereas it hath been adjudged, That an Obligation of 40 l. for an appearance is sufficient, and shall excuse him an Action upon the Case, for suffering one to escape, being before taken upon a mean Process; and therefore the taking of a greater Bond is extortious, and void within the Statute; for if he should have such liberty he may take Bond of 1000 l. and so oppress the people: Sed non allocatur; for the Statute doth not restrain him to any sum or any sureties; for he may take one, or two, or more sureties according to his discretion; and when it is only for the appearance of the party, he may take what Sum he please to force the party to appear: And although it hath been adjudged, That

That the taking of a Bond of 40 l. is sufficient to excuse him for an escape, because by the Statute he is enforced to let him to Bail; yet non sequitur, that he should be restrained from taking a Bond of a greater Sum: Wherefore it was adjudged for the Plaintiff.

Somerfall *versus* Thomas Barneby, Trin.
9 Jac. Rot.

Assumpsit: Whereas Communication was betwixt the Plaintiff and Defendant, for and concerning credit to be obtained and given for Charles Fox; That the Defendant in consideration of the premises, and in consideration, that the Plaintiff would be obliged for the said Charles, in such Sums of money, and to such persons, as the said Charles should desire of the Plaintiff: assumed, that he would discharge and save harmless the Plaintiff, of and concerning all such Sums of money, and all such debts as he should become bound to any person in, as surety for his said Son; and alledgeth in fact, that he at the request of his Son, 14 Novemb. Jac. at such a place became obliged, as Surety for the said Charles for his debt, to one Robert Clerk in 240 l. with condition for the delivery of 20 foders of Lead, upon the 20 day of May following; the which 20 foders of Lead, nor any part thereof the said Charles did not deliver: Whereupon the Bond was forfeited, and he compelled to pay the said 240 l. for the debt of the said Charles, to the said Robert Clerk. The Defendant pleaded Non assumpsit, and found against him to his damages of 250 l. and now moved in arrest of Judgment; First, because it is alledged, that he was obliged at the request of the said Son, and doth not shew the day nor the place where the Son requested: Sed non allocatur; for it is intended, and shall be referred to the day and place that he was bound. Secondly, it is alledged, that he was obliged with a Condition to deliver 20 Foders of Lead, so he is not obliged for any debt of the Son, but for a Collateral matter, which is not within that promise, no more than if he had been obliged to assure Lands of his Fathers: Sed non allocatur; for this Bond to deliver a Commodity of Lead, is as well a Debt, as if he had been obliged to deliver money. Thirdly, it is alledged, That he entered into a Bond with the Son to deliver Lead, but it is not expressed, whom the Lead should be delivered: Sed non allocatur; for it shall be intended to be to him to whom the Bond was made. Fourthly, because it is not alledged, that he gave notice unto the Defendant of that Bond. nor requested him to save him harmless from it; and the Defendant is a stranger thereto, and doth not know in what Bonds the Plaintiff is obliged

(3)

Supra 285;
P. 345.

ged

Ante 102.

1 Cr. 132, 133.

Post. 297.

3 Cr. 613.

Post. 433, 684.

Co. 5. 24.

ged with his said Son; and being a future thing to be entred into by the Plaintiff, the Defendant being a stranger, ought to have notice thereof from him: But if it had been to save him harmless from Bonds formerly entred into, it had been otherwise; for there by intendment, the Defendant had as well Conulance of them, as the Plaintiff: Sed non allocatur; for the Court said, it was all one, and that he at his peril ought to take notice thereof. Fifthly, because it is not alledged, that he was compelled to pay 240 l. per debitam legis formam, nor doth shew how: Sed non allocatur; for it is not material to be shewn: Wherefore it was adjudged for the Plaintiff.

Tampion *versus* Newson and Bridget
his Wife.

(4)
Yelv. 210.

Ant. 6.

Hob. 126.

1 Cr. 417.

Aut. 239.

Post. 530.

A Sumpsit: Upon a promise of the *Feme dum sola fuit*; The Plea was entred, Et prædict. Johannes Newson & Bridgeta ven. Et defend. vim & injuriam, &c. Et ipsa Bridgeta dicit, quod ipsa non assumpsit, Et hoc, &c. Et prædict. querens similiter: And this being tryed, and found for the Plaintiff, it was moved in arrest of Judgment, That a Plea of a *Feme* without the Baron it no Plea at all; and an Issue being joyned and tried thereupon is idle, and not aided by any of the Statutes of *Jeofails*: And of that opinion was all the Court: Whereupon a Repleader was awarded.

Burton *versus* Eyre.

(5)

Error of a Judgment in the Common Bench, in an Action upon the Case against the said Burton, being Sheriff of the County of Lancaster, for suffering one Mark Woodroff to escape out of Execution; and shews how he had brought a Writ of *Debt* of a 100 l. in the Common Bench, against the said Mark, and recovered there against him; and after a *Capias ad satisfaciendum*, and a *Non est inventus*, thereupon returned, and a testatum that he commanded himself in the County of Lancaster, a Writ was awarded to the Chancellor of the County Palatine of Lancaster, that he should command the Sheriff to take the said Mark ad satisfaciendum, &c. Ita quod the said Chancellor should have him, &c. And that the Chancellor commanded the Sheriff, that he should take the said Mark, Ita quod the Sheriff should have him, Coram Justicia &c. And that the Defendant being Sheriff, did thereupon arrest him, and had him in Execution; and at Derby permitted him to go at

at large, &c. per quod actio, &c. The Defendant pleaded Not guilty, and found against him, and Judgment accordingly; and thereupon Error now brought, and assigned; first that an Action upon the Case lies not for this escape, but he ought to have brought Debt: Sed non allocatur; for it is at his election to bring either one or the other. Secondly, that the Writ directed by the Chancellor to the Sheriff, was not warranted by the Writ directed unto him, for it varies from the command; for it ought to have been, That the Sheriff should have the body before the Chancellor, Ita quod he should have him before the Justices, &c. And the Warrant is, That the Sheriff himself should have him before the Justices, &c. which ought not to be; for he is not any Officer to the Court of Common Bench: Sed non allocatur; for although there be Error in the Process, the Sheriff cannot take advantage thereof: But having suffered him to escape, he is responsible to the party. Thirdly, because the Declaration was in Reciting the Writ; That whereas he hath brought a Writ of Debt against Mark Woodroffe, and recovered, &c. And shews all the matter of the escape, &c. And then it is as the usual course in the Common Bench is, unde queritur quod cum, he brought a Writ of Debt against the said Mark Woodroffe, &c. and he doth not say, the foresaid Mark, &c. So it may be a stranger, and therefore it is not good; and of that opinion was Williams: But afterwards, upon conference with the Prothonotaries, and view of divers Presidents in the Book of Entries, in the Title, Actions upon the Case, (That it is the common Course in Action upon the Case, after recital of the Writ, in the unde queritur to begin de novo, and not to say, prædict. &c.) All the Court held that both courses are well enough: Wherefore the first Judgment was affirmed.

Ant. 3. 289.

2 Vul. 197.

William Bird Senior, & William Bird
Junior *versus* Orms.

ERROR of a Judgment in Trespas in the Common Bench; because they appeared by Attorney, whereas William Bird Junior was an Infant, and ought to appear by his Guardian: And upon this Error assigned, it was demurred; because it was alledged, that although it were cause to reverse a Judgment against an Infant, yet it was good enough against him of full Age, and he should not take any advantage of the nonage of his Companion. But it was moved on the behalf of the Plaintiffs in the Writ of Error, That the Judgment being entire for Damages against both, it shall not be reversed for one only, but for both; and therefore

pp was

(6)
1 Rol. 776.

Ant. 274.
Post. 303.
1 Cr. 471.

was vouched, That in an Ejectione firmæ in Chester, this very Term, Error was brought by two, for the nonage of one, and the rule given for the reversal thereof: But the Court said, they did not remember any such rule given, and that they would well advise thereof, 20 Ed. 4. 7. 28 H. 6. 9. 19 Aff. 8.

Browne *versus* Jerves, Trin. 8 Jac. Rot. 1880.

(7)
Yelv. 209.

1 Cr. 58.
Post. 416.

T Respals: Upon a special Verdict the Case was such; William Browne being seised in fee of Lands in Reculver, Edington and Ham, holden in Socage, having Issue a Son John Brown, and two Daughters, and having a Brother Roger Brown, who had Issue three Sons, viz. Henry, Matthew, and William, deviseth all his Lands to John his Son, and his Heirs; and if he died without Issue, he deviseth his Lands in R. to Matthew his Nephew in Fee; *Item*, I devise my Lands in H. to Henry my Nephew in Fee: And whether that were a good Devise to Henry B. by way of Remainder after the death of John without Issue, or an immediate Devise to Henry, and a Countermand of the Devise to John quoad those Lands, was the question; for John devised those Lands, and died without Issue; and between the Devisee and Henry was the question: And it was resolved, that it was a Limitation by way of Remainder to Henry, and no Countermand; for the words, *Item*, I devise, &c. shall be construed, That if John died without Issue, then the Land should remain as the Devise was made to Matthew; and the first Limitation to John is, as to him and his Heirs of his body, and no Fee; and so all the Clauses of the Will stand together: Wherefore it was adjudged accordingly.

Ells *versus* Clark, Trin. 9 Jac. Rot. 295.

(8)

Ant. 147.
Post. 309, 338.
Hob. 75.

D Ebt upon an Obligation; and declares, quod concessit se teneri in quinquaginta libris. The Defendant demands Oyer of the Bond, which was entred in hæc verba; Noverint, &c. Teneri, &c. in quinquagesimis libris; and for this variance he demurred in Law: For it was objected, that these words in a bond have a construction that he obliged himself in fiftieth pounds, and not fifty pounds: Sed non allocatur; for quinquagesimis & quinquaginta in a Bond, shall be construed to be all of one sense, and the intent of the parties was so: Wherefore it was adjudged for the Plaintiff.

Warley *versus* Purley.

DEbt upon a Lease for years made by William Warley, and (9)
 Counts, that afterwards, viz. the 11 of July, 7 Jac. Wil- Yelv. 213.
 liam Warley by Indenture bargained and sold that Land to him
 in Fee, Quæ Indentura postea infra sex menses, viz. 7 Novembris
 7 Jac. fuit debito modo irrotulata juxta formam Statuti. The De-
 fendant pleaded Nondebet, and found against him: And it was
 now moved in arrest of Judgment, that the Declaration was not
 good, because it was not shewn in what Court it was inrolled:
 And for that cause the whole Court held it to be ill; for it ought
 to appear, that the Court may know whether it be duly inrolled;
 as also, that the party against whom it is pleaded, might have
 Conusance in what place to search for it; otherwise the search will
 be infinite: and to say that it is juxta formam Statuti, will not
 help it: Wherefore it was adjudged for the Defendant.

Foxhall and Sands *versus* Corderoy, Trin. 9 Jac. Rot. 378

DEbt for 91 l. 12 s. 8 d. upon a Bill Obligatory, dated 1 May (10)
 8 Jac. solvend. 1 November following: The Defendant de-
 mands Oyer of the Bill, which is entred in hæc verba; Be it known,
 that I William Corderoy do acknowledge my self to owe and to be
 indebted to John Foxhall and William Sands in the Sum of 91 l.
 12 s. 8 d. to be paid the first of November following: For which
 payment to be made, I bind my self to John Foxhall in 100 l. Da-
 ted, &c. And it was thereupon demurred: And whether Foxhall
 ought to bring the Action for the 100 l. or both of them for the
 91 l. 12 s. 8 d. was the question; Et adjournatur.

Purfry *versus* Gryme, Hill. 8 Jac. Rot. 373.

TRespals: For that the Defendant, four Ashes of the Plai- (11)
 niff, apud Shaldesdon, in a place called Cave-close, cut
 down, took and carried away: The Defendant saith, quod actio
 non, because long time before the Plaintiff had any thing to
 do, &c. in the place where &c. one John Purfry was seised in Fee
 of the Close in which, &c. And 3 April, 21 Eliz. by Indenture of
 the same date, demised to Jerome Corbet and others, the said
 Close inter alia, excepting the wood, and underwood thereupon
 growing, Habendum for the life of one Ann Purfry: And further
 covenanted with them, quod licitum foret for the said Lessees
 and their Assigns, to take upon the Premises necessary feribote
 and Houfe-hote, &c. to be expended upon the Premises, or for
 Reparation of the Premises: That the said John Purfry died,
 and the said Ann surviving him, took to Husband one John Hare-

court; That the said Jerome Corbet, and the other Lesses, assigned over their Estate to the said Ann; That the Defendant as their servant, took the said four Acres for necessary Cartbote, Ploughbote, and bote, to be expended upon the Premises; and avers the life of the said Ann; and it was thereupon demurred; First, because he justifies by force of a Covenant in an Indenture, and doth not shew the Indenture; it being a thing which cannot be granted without Deed. But it was thereunto answered by Yelverton for the Defendant, that in regard the Defendant doth not claim title thereto, but only as a servant, nor any interest therein; and it doth not appear that the Plaintiff hath any title to those Trees or Land, by any matter shewn in the pleading; therefore the Plea is good against him, without shewing the Deed of Covenant. But all the Court held the Plea to be ill; for the servant justifying under the interest of his Master, and meddling with the title, ought to shew the Deed; for it is the substance of the title, and without shewing it, he cannot justify; and it is folly to justify under one, who either could not, or would not shew the Deed; And the not shewing thereof is matter of substance, and not of form only. Vid. H. 6. 42. 14 H. 8. 4. 21 Ed. 4. 50. Secondly, it was moved, that this Covenant being without the word Grant, is not sufficient to justify the taking, but it is cause of Action, if it be denied. But the Court seemed to incline, that it was well enough, being by the same Deed of Lease, if it had been well pleaded. Thirdly, it was moved, that the Plea was not good, because it was not shewn, that the Master expended them for those purposes; and of that opinion was the whole Court. Vid. 21 H. 6. 46. 12 Ed. 4. 8. But for the first cause principally the Plea was holden to be ill, and adjudged for the Plaintiff.

Post. 317.
Co. Lit. 226. a
Pl. C. 148. b.

Post. 301.

Lilburne versus Heron.

(12)
Yelv. 211.

ERROR; To reverse a Judgment in *brief de droit*, of Lands in Thickley; the Writ is, Quia Dominus remisit nobis curiam suam. The Defendant appeared, and imparled, and after divers days of imparlance, the Tenant made default; and thereupon Judgment final was given in Durham; and now Error brought and assigned, First, because the Writ supposeth, Quod Dominus nobis remisit curiam suam; whereas a Writ of Right ought to be returnable, Coram Justiciariis de Communi Banco; and not Coram Justiciariis itinerantibus in Durham: Sed non allocatur; for it is the usual Course for all Writs of Right in Durham to have that Clause, and yet to have the Writ returnable before the Judges there by Commission: No recovery can be in the Common Bench, of Lands in Durham, 9 H. 7. 12. 1 Ed. 4. 10. Secondly, In this, that Judgment final was given upon a default after imparlance, where it ought to have been only a Petit

F. N. Br. 3. a.

tit Cape, as it is, where a Tenant makes a default after Issue joyned; for no Judgment final shall be thereupon after Issue joyned and tryed. But it was thereto answered, True it is, that after Plea pleaded, and Issue joyned, or Demurrer, and day given over, if the Defendant makes default, no Judgment final shall be given, but the Petit Cape shall be awarded; but a default after imparlance, and before a Plea pleaded, is quasi a departure in despite of the Court: And therefore Judgment final shall there be given. Vid. Co. 5. fol. 85, Penrins Case, 26 H. 8. 8. 28 H. 8. Dy. 24. 12 Ed. 2. Judgment 234. 19 Ed. 2. ibid. 238. 39 H. 6. 16. 12 Ed. 4. 21. 12 H. 7. 10. 13 H. 4. Judgment 245. 33 Ed. 3. ibid. 262. in what Cases a Petit Cape shall be only awarded; in what Cases a Seisin of the Lands shall be only awarded, which is but a common Judgment; and where Judgment shall be, that the Demandant shall hold it in perpetuum; which is a final Judgment. Note, to this point the Court did not give any resolution, but seemed to incline, that a Judgment final should not be given, unless upon a departure in despite of the Court; which is upon a default the same Term after imparlance; but where day is given to another Term, or to another time certain, and then the Tenant makes default, it shall be otherwise. But therefore the Court gave no resolution: But for the other matter, which was not assigned for Error, viz. for that the Writ bore *Teste 20 Febr. 6 Jac.* and the Declaration of the *Espleese* was alledged in the time of Queen Elizabeth, of the Seisin of the Demandant himself; and by the Statute of 32 H. 8. of limitations, a Writ of Right of his own Seisin cannot be but within thirty years before the Writ brought: And this Seisin may be before that time; therefore the Writ is ill: And for that cause the Judgment thereupon given is Erroneous: Wherefore for this cause chiefly the Judgment was reversed.

Dyer 98. a.

32 H. 8. cap. 8.

Legate versus Pinchion, and others.

Error in the Exchequer-Chamber, of a Judgment in the Kings Bench: The Case was; Sir Edward Pinchion and Sir Richard Weston, Executors of Rose Pinchion, brought Action upon the Case against John Legate Executor of William Legate, of a promise of the Testator; for that the Testator of the Plaintiffs Anno 34 Eliz. was indebted 200 l. In consideration whereof, the Defendants Testator assumed to pay it upon request, and that neither the Testator in his life, nor the Executor after his death, licet sepius requisiti, had paid; whereupon, &c. The Defendant pleaded Non assumpsit, and found against him, and Damages assessed to 260 l. And thereupon the Plaintiff had Judgment, and Error assigned, first, That this Action lies not against an Executor; for he is not chargeable upon a promise of his Testator. Secondly, that the Averment in the Declaration, that he had *Assets* to pay all Debts; and not averring that he had

(13)
Co. 9. 86. b.*Assets*

Pl. C. 182. b.
Co. 9. 87. a
Post. 404.

Co. 9. 90. b.
Ant. 273.
3 Cro. 59.

Assets to pay Legacies, and sufficient to satisfy and discharge that promise, is not good; for so is the Case between Norwood and Read. And this being opened before Coke Chief Justice of the Common Bench, Warburton and Foster Justices of the same Court, Tanfield, Snigg, Altham and Bromley, Barons of the Exchequer, without hearing any argument, they resolved to affirm the Judgment; for this Debt rising upon a Loan and promise of the Testator to pay; which being a promise for the payment of a meer Debt, and not to do any collateral act; and the Testator himself by reason of this promise, could not have gaged his Law; therefore the Executor is chargeable in this Action. And although there be not any averment, that he had *Assets* to pay Debts, it is not material, for that should come on the Defendants part to shew; for if he had not *Assets*, having pleaded Non assumpsit, he hath lost by that advantage: Wherefore the Judgment was affirmed; and Coke willed the Students to observe, that this is now adjudged by all the Judges and Barons of all the Courts.

Cleydon *versus* Taylor in the Exchequer-Chamber.

(14)

3 Cr. 308.
Ant. 128.

Ant. 277.

Error of a Judgment in the Kings Bench; for that the Bill in an Action upon Trover, was of 400 bushels of Pippins the Declaration was forty bushels: And Judgment being given upon Nihil dicit, the Writ of Enquiry of Damages recites the Trover and Conversion of 400 bushels: And thereupon Damages found to 40 l. and Judgment accordingly; and Error assigned, because the Writ of Enquiry of Damages varied from the Declaration upon the Record; there being more in the Writ than in the Record upon which the Judgment was entred. The Defendant hereupon alledged diminution, and procured the Bill upon the File to be certified; and then pleaded, In nullo est erratum: And all the Justices and Barons held, that it is Error; for the Bill doth not warrant the Declaration: And the Judgment ought to be warranted by the Declaration on the Record; and if it be variant from it, is Error. And they said, that it could not be amended; for it is the Record, to which the party was to plead: Wherefore rule was given for Reversal of the Judgment; but afterward stayed upon a surmise that the Record it self was miscertified.

Anthony Fleyres Case in the Court of Wards.

(15)
Co. 9. 125. b.

Anthony Fleyre and Ann his Wife being seised in Fee of the Manor of D. in right of Ann, holden of the King by Knights-service in capite in 36 Eliz. levied a Fine with a Remainder to them, and to the Heirs of the body of Anthony, Remainder to the right Heirs of Anthony: Afterwards, 2 Jac. they levied

levied a fine of that Mannor, *sur Conscience de droyt come ceo, &c.* to the use of themselves for their lives, Remainder to Anthony their first Son in tail, Remainder to other of their Sons, Remainder to the right Heirs of Anthony; Afterward Anthony the Father died, Ann the Feme survived, Anthony the Son being within age; and whether he should be in Ward for his Land or body, was the question; and resolved by the two Chief Justices and Chief Baron, That he should not, because the Estate limited to the Feme is her ancient Estate, which she had by the first fine, which was extracted out of her own Inheritance; wherefore during her life, there is not any Wardship for the third part of the Land or body; for the Baron was not sole seized at the time of the second Conveyance made; so out of the intent of the Statute and words of 34 H. 8. Co. 9. 126. b.

Termino

Termino Hillarii,

Anno nono JACOBI Regis in Banco Regis.

John Royleys Case.

(1)

John Royley was Indicted of the murder of one William Derman; and upon his Trial, a special Verdict was found before Justice Daniel, which was removed hither by Certiorari: Whereupon the Case was found to be such; That William Royley son of the said John Royley, fighting with the said John Derman in the field, and the said John Derman beating him so as his nose bled, he thereupon went to his Father, telling and complaining unto him of that Battery: Whereupon he instantly went into the field, being a miles distance, and finding him, called him Villain, and other opprobrious Terms, and struck him with a little Cudgel, of which stroke he afterward died. And whether that were Murder, or only Man-slaughter, they doubted, and prayed the discretion, &c. And all the Court resolved, that it was but Man-slaughter; for he going upon the complaint of his Son, not having any malice before, and in that anger beating him, of which stroke he died, the Law shall adjudge it to be upon that sudden occasion, and stirring of blood; being also provoked at the sight of his Sons blood, that he made that assault; and will not presume it to be upon any former malice, unless it be found. And although the distance of the place where his Son complained, was a mile, it is not material, being all upon one passion. So if one hear that his Brother, or Cousin, or Servant is fighting upon a sudden occasion, and he goes to the place where they are fighting (although a mile or more distant) and finding the Adversary, fights with him and kills him, it is not Murder, but Man-slaughter: Wherefore it was adjudged, that it was not murder; and being before the general Pardon, was discharged thereby.

Bacon *versus* Gyrling.

(2)

TRESPASS: Upon demurrer it was resolved, Where Lessee for life makes a Lease for years, excepting the wood, under-wood, and trees growing upon the Land, that it is a good exception although he hath not any interest in them, but as Lessee, because he remains always Tenant, and is chargeable in Waste: Wherefore to prevent it, he may make the Exception: But if Lessee for years assigns over his term with such an Exception, it is a void Exception.

Co. 5. 12. b.
3 Cr. 18.

Dawkes

Dawkes *versus* Pilfield.

Error of a Judgment in the Kings Bench, in Trespas: The (3)
 Error assigned was, Because the Plaintiff in his Declaration Counts to his damage of 40 l. And the Jury find damages to 40 l. and for Costs 20 s. which was increased by the Court to 5 l. more; So the Damages and Costs assessed by the Jury, are more than the Plaintiff Counts; which ought not to be, as 13 H. 7. 16. is: But they all resolved, that it was not any Error, for it might depend so long in suit, or otherwise, that there might be great reason the Plaintiff should recover more for Costs and Damages than the first counted: But for Damages only, they may not extend more than what the Plaintiff himself had declared; And denied the Book aforesaid to be Law: Wherefore the Judgment was affirmed.

Co. 10. 117. a. b.
Ante 69. 70.

Co. 10. 117. a. b.

Barwicke and Turner *versus* Gybson, in the Exchequer Chamber.

Covenant: For that the Defendant covenanted by Indenture (4)
 with them; whereas the King had granted the Office of Aulnage or of all Drapery to the Duke of Lenox, (who had made the Plaintiffs his Deputies for seven years through all places within the County of Essex, besides Colchester; That the Defendant covenanted with them; Whereas the said Duke had made a Deputation of that Office in Colchester for two years, to one Everden, That at the end of the two years he would procure unto them a Deputation for seven years, in the same manner as Everden had it; Proviso, That they upon the making thereof, should give security for the payment of 100 l. per annum Rent for it, and performance of Covenants: And they alledged in fact, that they were always ready to give security for the Rent, and that the Defendant had not procured the Deputation; Whereupon the Defendant demurred: And after Argument the Declaration was adjudged good: And upon a Writ of Enquiry of Damages, damages assessed to 500 l. and Judgment given accordingly; and thereupon a Writ of Error brought in the Exchequer-Chamber. The first Error assigned was, Because they do not alledge performance of the promise, but only a readiness to have given security: Sed non allocatur; For they need not give security until deputation made; and the non-performance of the promise ought to come on the other part. Secondly, Because it is not shewn, that they required a deputation to be made, and the quality how the other was made; nor in fact, that there was any deputation made to Everden: Sed non allocatur; For the Covenants mention that there was a deputation; and he is estopped to say the contrary, and at his peril ought

Ante 288.
Post. 391.

to procure such a one to the Plaintiffs as the other was ; and it lies not in their notice how, and in what manner the other was ; And that the Defendant ought to procure it immediately after two years expired, that the Plaintiffs might not lose the profits thereof after they were due. Thirdly, Because they shewed not the breach, according to the usual form, *Et sic non tenuit conventionem in hoc, &c. Sed non allocatur* ; for there being a breach thereof sufficiently alledged, they need not make a repetition ; And when the substance is alledged, the pursuing of the usual course is not material : Wherefore the Judgment was affirmed.

Termino

Termino Paschæ,

Anno decimo J A C O B I Regis in Banco Regis.

Browning *versus* Fuller.

Error of a Judgment in the Common Bench: The Error (1)
 assigned; For that in Assumpsit brought as Executor, al-
 though he shews himself to be Executor to him to whom
 the promise was made, yet he saith not, Testamentum hic
 in curia prolatum. The Defendant pleaded Non assumpsit, and
 found against him, and Judgment accordingly: And this being
 assigned for Error, was held to be matter of substance, and not
 of form only; And was therefore reversed. Stat. 16 & 17 Car. 2. 3 Cr. 551.
 cap. 8. Post. 409.

Rice *versus* Harveston.

Ejectione firmæ: The Plaintiff declares of a Lease made by (2)
 John Bull: The Defendant pleads, that the Land is Copy- Yelv. 227.
 hold Land, parcel of the Mannor of S. &c. whereof the King was
 and is seised, who by his Steward such a day granted the same
 unto him in fee, to hold at will according to the custom of the
 Mannor: By vertue whereof he was admitted, entred, and was
 seised; and so justifies. The Plaintiff replies, that long before
 the King had any thing in the Mannor, Queen Elizabeth was seised
 thereof in fee, in Right of the Crown; who by her Steward, at
 such a Court, granted the Land in question by Copy to him in
 fee, to hold at will according to the custom of the Mannor, who
 was admitted and entred. Upon this Replication the Defendant
 demurred, supposing that the Plaintiff ought to have traversed
 the Grant alledged by him in his Bar. But the Court held it to 2 Inst. 212.
 be a good Replication; For the Plaintiff hath confessed; and 2 Cr. 324. 581.
 avoided the Defendants Title by a former Copy granted by
 Queen Elizabeth; and so needed not to traverse the Grant to the
 Defendant. Vide Coke 6. Hilliers Case, fol. 24.

Smith *versus* Flynt.

(3)
Jones 68.
Lat. 2.
1 Bull. 181.

Action for words; Thou hast harboured and received thy Son into thy house, knowing before that he was a Seminary Priest. The Court held the words to be scandalous and actionable; Because that offence is made felony by the Statute of 27 Eliz. cap. 2. And Judgment was given for the Plaintiff.

Tynan *versus* Bridges, Trin. 8 Jac. Rot. 1222.

(4)
Yelv. 214.

Ante 170.

Debt upon an Obligation, conditioned for performing of an award made by Arbitrators by them chosen; who upon the 24. of March awarded, That the Defendant should pay to the Plaintiff at Mich. next following 20 l. For not payment whereof, the Action was brought. The Defendant pleaded the Plaintiffs release of all Actions and Demands made unto him the tenth of April: The sole question was, whether by this release thus made, the payment of the 20 l. by the Defendant to the Plaintiff awarded as aforesaid, be absolutely gone and released. And the whole Court conceived, that the release was not any Bar to the Plaintiffs Action: And a difference taken by Justice Williams; where an Obligation is entered for payment of money at a day to come; It is there a debt and duty presently, and may be discharged by such a release before the day of payment: But it is not so in Case of an Annuity, Rent, or in an Action of debt for non-performance of an award made for payment of money at a day to come. Vide Litt. Pla. 512. 513. But no Judgment was given in this Case.

Humphry *versus* Damion.

(5)

Ante 275.

3 Cr. 10.

Lesse for years, rendring Rent at Mich. and our Lady, upon condition of Reentry for default of payment, is ousted by a stranger; The disseisin continues till the day of payment; The Lessor afterwards demands the Rent, and the Lessee refused to pay it: Whether the Lessor may enter for the condition broken, in regard the condition was suspended by the disseisin. And it was held by the whole Court, That the Lessor may either enter upon the Land for the condition broken; or he may (if he will) distrain for the Rent: For the Land leased shall be subject to those lawful remedies which the Lessor provides for the recovery of his Rent or possession, into whose hands soever the Land comes: And it is not the Act of a Stranger that can deprive the Lessor of the advantage of that condition which he annexed to the Lessors estate when he parted with the possession of his Land.

The Lady Montagues Case.

The Lady Montague did prosecute for the forfeiture of a Copy-
 hold of a Mannor of the Lord Montagues her late Husband (6)
 done in his life time, being part of her Joynture : The Case was,
 That the Copyholder made a Lease of his Freehold Lands for ten
 years ; And to avoid a forfeiture, made a Lease for a year only of
 his Copyhold, according to the custom ; And Covenants with the
 Lessee, That he shall enjoy the Copyhold Lands de anno in annum
 during the ten years (For which he had 20 l. in hand paid him)
 and that if he did put him out after one year, or at the end of any
 one of the years, then the twenty pounds (which he had still be-
 fore hand) should be accounted for the Rent of the last half year :
 And it was held by the Court, If a Copyholder makes a Lease for
 a year warranted by the custom of the Mannor, Et sic de anno
 in annum during ten years ; This is clearly a good Lease for ten
 years, and will make a forfeiture : But here in this Case the
 Copyhold Land is not demised to hold for a year, Et sic de anno in
 annum for ten years ; But only for a year, according to the custom,
 and a covenant for the holding it for a longer time at the will of
 the Lessor : Yet admitting that this were a Lease for ten years,
 and so consequently a forfeiture, yet the Lady cannot take advan-
 tage thereof ; For if a Copyholder makes a Lease of his Copyhold
 Land contrary to the custom ; and the Lord of the Mannor dies
 before his entry or seisure for the forfeiture ; That he or they in
 reversion or remainder shall never take advantage of the forfeiture
 done or committed before his or their time.

1 Cr. 234.
Post. 308.

Ante 292.

Co. Lit. 53. b.
2 Vul. 79.

Termo

Termino Trinitatis,

Anno decimo J A C O B I Regis in Banco Regis.

Anne Long *versus* King, Trin. 8 Jac. Rot. 13.

(1)

Action for these words of the Plaintiff, viz. Mrs. Master was robbed of 40 l. and 100 marks worth of plate; and *John Ford* and *Anne Long* (*innuendo* the Plaintiff) had it, and for that they will be hanged. The Defendant pleaded Not guilty, and found against him, and damages assessed to 20 l. And it was thereupon moved in arrest of Judgment, that an Action lay not for these words; For in saying, the Plaintiff had it, he doth not shew, that she stole it; For she might have it by Trover, or emption, or otherwise lawfully; and he doth not charge her, that she stole it: Also in saying, They will be hanged for it, it is but his opinion, and not a direct laying of Felony to their charges. Upon the first motion the Court doubted thereof; but being afterwards several times moved, upon the first day of this Term the Court resolved, that the Action lay; For all the words being laid together, it shall be intended that he spake them in the worst sense, (viz.) That the Plaintiff had those goods feloniously, and was an Actor in the Robbery; And it is further aggravated and explained, in saying, They will be hanged for it: Wherefore it was adjudged for the Plaintiff. Note, afterwards this Judgment was reversed in a Writ of Error in the Exchequer-Chamber, because the words are not actionable.

Post. 337.

Mortimer versus Petifer.

(2)

Replevin; For the taking of two Cows in Buckland-Head in Buckland: The Defendant pleaded, That Buckland-Head contains ten Acres, whereof half an Acre was Coppelhold, parcel of the Mannor of Buckland in Buckland; And that within the Mannor is such a custom, That every Coppelholder, having any Coppelhold Land within the said ten Acres, should have common from such a day to such a day, in all the residue of the said ten Acres; and shews, That he was a Coppelholder of one rood of Meadow in the said ten Acres, and so justifies: And Issue being thereupon, and found for the Plaintiff, it was moved in arrest of Judgment, that there was a mis-trial; For the Ven. fac. is, de vicineto Manerii, where it ought to have been de

Hob. 286.

de Buckland, although the Issue is upon the custom of the Mannor;
 And of that opinion was the whole Court; For the Mannor being
 alledged to be the Mannor of Buckland in Buckland, the Ven. fac. Ante 8. 86.
 Co. 6. 14. b.
 ought to have been from Buckland: Wherefore a Ven. fac. de novo
 was awarded.

King *versus* Marborough and Craker, Hill. 8 Jac.
 Rot. 991.

ERror of a Judgment in the Kings Bench in an Ejectione (3)
 firmæ: The Error assigned was, because Craker, one of the
 Defendants at the time of the Judgment was within age, and ap-
 peared by Attorney, where it ought to have been by his Guardian,
 the Judgment being upon Verdict, and it was thereupon demur-
 red; For it was said, That this was not Error, but quoad him
 within age: But all the Judges and Barons held, in regard the Ante 290.
 damages and costs are entire, that the Judgment is revertable for
 both; and so was reversed.

Kersey *versus* Lovet.

ERror in the Exchequer-Chamber, of a Judgment in the Kings (4)
 Bench, in an Ejectione firmæ: The Error assigned was, be-
 cause the Plaintiff himself betwixt the Verdict at the Nisi prius,
 and the day in Banco entered, and so had abated the Writ; And it Ante 261.
 was thereupon demurred, and now he would not insist upon that
 Error, but moved another Error not assigned; Because the Ven.
 fac. was returnable, Die Veneris post Crast. Purific. Sed non alloca-
 tur; For so it is always intended, and so are all the presidents:
 Wherefore it was affirmed.

Edward Miles *versus* Richard Prat, Thomas Richardson,
 and Nicholas Babbs, 7 Jac. Rot. 413.

TRESPASS: For entering into a house in Needham Market, and (5)
 taking of a Cupboard, Chest, and other goods: Nicholas Co. 11. 7. 2.
 Babbs pleaded Not guilty, Richard Prat pleaded Not guilty, prater
 to the entry into the house and taking of the Cupboard; and quoad
 them, he justifies, by reason of an extent upon a Statute, and a Libe-
 rat. thereupon: And Thomas Richardson pleaded the like plea; and
 thereupon was pleaded, *Nul tiel record*, and the Defendant had day
 to bring in the Record, usque Crast. Pur. 7 Jac. And a Ven. fac. to
 try the Issue, returnable the same day: And at the day, the De-
 fendant failed of the Record; whereupon it was adjudged against
 him quoad that, Et quia nescitur quæ damna, ideo a Ven. fac. was
 awarded, tam ad inquirendum de Execut. prædict. quam de
 damnis,

Ante 211.

Post. 553.

Ante 36.

Post. 354.

Co. 7. a. 8.

Damnis, &c. Returnable quind. Pasch. and then the Record is, postea continuato inde processu in placito prædict. Jurat. posit. usq; ad in Octab. Michaelis, &c. Nisi prius, &c. and then the postea was returned, and the Verdict, and 100 l. damages found, and Judgment accordingly; And Error thereof brought and assigned, because there was not any continuance between Term Pasch. and Trin. Term, nor from Trin. Term to Mich. Term, but that Term was utterly omitted: And there being this discontinuance, there was a failer of the Record; whereupon the Inquest is but an Office, which is a discontinuance not aided by the Statute; For that aids only discontinuances after Verdict, but not after Demurrers, or failer de Record: And although Verdict is for part, yet the damages being entire; It being discontinued in part, is discontinued in the whole, and not aided. But the Justices said, (and so they were informed by the Clerks) that Continuances may be upon the Plea Roll, or upon the Roll of the Ven. fac. after Issue joyned: And if it be upon any of them, it is well enough: But the Court being certified, that it was not upon any of them, The Judgment for this Cause was reversed.

Salman *versus* Bradshaw.

(6)
Co. 9. 60. b.

Ante 171.
Co. 9. 61. a.
Co. Lit. 303. b.
Post. 370.

Post. 312.

COvenant: For that the Defendant let unto him the Mannor of Stanton in the County of Leicester for six years by Indenture; And Covenanted, that he had lawful Right and Estate, to let it for that Term: And assigns for breach, That he had not right nor lawful Estate to let it, and so broke his said Covenant: The Defendant pleads a Concord, that he gave unto him 10 l. in satisfaction, &c. And Issue thereupon, and found for the Plaintiff to his damages of 120 l. and Judgment accordingly; And Error thereof brought before the Judges and Barons: The principal Error assigned was, Because the breach of the Covenant was not well assigned, for that it is not shewn, that he had an Estate, nor how the Lessor had not any Right, or that a stranger had evicted him by Title: Sed non allocantur; For the Covenant being general, the breach may be assigned as general as the Covenant, and it lies not in the Plaintiffs notice who hath the rightful Estate: But the Defendant ought to have maintained, that he was seised in Fee, and had a good Estate to demise; And then the Plaintiff ought to have shewn a special Title in some other: But prima facie, the Count is good, the Covenant being general, to assign a general breach: Wherefore the Judgment was affirmed.

And the Court said, that the Defendant ought to have maintained, that he was seised in Fee, and had a good Estate to demise; And then the Plaintiff ought to have shewn a special Title in some other: But prima facie, the Count is good, the Covenant being general, to assign a general breach: Wherefore the Judgment was affirmed.

Beal *versus* Brasier.

EJectioe firmæ; For Lands in Blackthorn, upon a Lease of one John Weatherhead: Upon special Verdict the Case was such, (7) Yelv. 222. 32 H. 8. c. 34.
 A Copyholder in fee makes a lease for years by licence, rendering 5 l. Rent to him, his Heirs and assigns, at Mich. and at the Annunc. and for non-payment, A reentry; He surrenders over to the Lessor of the Plaintiff in fee; who being admitted, demanded the Rent afterwards at the day of payment, and for non-payment reentered; and whether his Entry were congeable or no, was the question: The sole doubt was, whether he who hath the Reversion of a Copyhold, by way of surrender may take advantage of a condition within the equity of the Statute of 32 H. 8. And without argument, Williams and Yelverton (absente Fleming) overruled it, That he could not, neither by the Common Law, nor by the Statute: 1 Cr. 25. 44.
 Wherefore it was adjudged for the Defendant.

R r

Termino

Termino Michaelis,

Anno decimo J A C O B I Regis in Banco Regis.

Odingsfells *versus* Derby & Jackson.

(1)
Yelv. 224.

Post. 365, 369.
Moore 866.

Ejectione firmæ : After Verdict upon Not guilty ; It was moved in arrest of Judgment, that the Declaration was not good ; For it was, that the two Defendants Intravit & ipsum (*le Plaintiff.*) a firma sua prædicta ejecit & expulit, where it ought to have been intraverunt & ejecerunt, &c. And being the point of the Action, is not therefore amendable ; the Bill also upon the File was found to be so : But all the Justices (Fleming absente) held it to be amendable ; For it is an apparent mispension of the Clerk.

Toose and his Wife *versus* St.

(2)

Post. 413, 438.
Hob. 268.

Post. 531.
1 Cr. 324.
Ante 150.

Action for words : For that the Defendant, speaking of one Alice Dunscombe widow concerning the death of her husband, said, Toose his wife (innuendo the Plaintiff) killed thy husband, (innuendo) John Dunscombe her husband, (lately dead :) After Verdict, it was moved in arrest of Judgment, That these words were not actionable ; for she is not accused thereby of Felony, for she might kill him by Physick, or by other means : And a president was shewn, in the Common Bench, between

where it was adjudged, that for these words, thou hast killed J. S. an action lies not ; For J. S. may come to his death, and the other peradventure be the means thereof, by Execution, Battel, Physick, or otherwise : wherefore the words are too general to maintain an action. But the Court here resolved, That this action well lay ; For it shall be intended, he spake them in the worst part, and in slander of the Plaintiff : Wherefore it was adjudged accordingly. Note, Between the same parties another Action was brought, because he said, Toose his wife is a Witch, (without further words) and adjudged maintainable.

Oaste *versus* Taylor.

(3)

Ante 6. 7.

Asumpsit, by David Oaste, Merchant-stranger, against William Taylor Merchant : For that whereas by the custom of London, between Merchants trafficking from London into the parts beyond Seas : If any Merchant, commorant in London,

don, and trafficking beyond Seas, direct his Bill of Exchange, bona fide, and without Covin, to another Merchant, commorant beyond Seas, and trafficking betwixt London and the parts beyond Seas; Upon such a Merchants' accepting a Bill, and subscribing it according to the use of Merchants, It hath the force of a promise, to compel him to pay it at the day appointed by the Bill; And alledgeth in fact, That William Kenton, being a Merchant, trafficking betwixt London and Middleburgh beyond Seas, and commorant in London, directed his Bill of Exchange to the Defendant, commorant in Middleburgh, and trafficking betwixt London and Middleburgh, requiring him to pay 355 l. Flemish, at the usance of four months to the Plaintiff, being a Merchant: And that the Defendant accepted thereof, *secundum usum Mercatorum*, and subscribed it, and had not payed it: Whereupon, &c. After Verdict, upon Non assumpsit pleaded, and found for the Plaintiff, It was moved in arrest of Judgment, because the Defendant is not averred to be a Merchant at the time of the Bill accepted.

Amyas Clifton versus Proctor.

ERror of a Judgment in the Common Bench, in an Action of (4)
Trove and Conversion of 300 Todas lanæ. The Defendant & Rol. 623. 2.
pleaded Not guilty; and it was found against him to his damages of 300 l. and Judgment for the Plaintiff: The first Error assigned was, because Todas is no Latin word, Anglice vocat. Todds; and therefore the Court cannot adjudge thereof, being intensible: Sed non allocatur; For it is a framed word to that purpose, to shew the intent of the Parties, although it be not a proper Latine word; And in the Register, fol. 110, 111. There is Pipam vini, Barrel cervisiæ; and the Book of Entries, 17. & 201. And Manne shewed a President the 12 H. 7. for this point, Todd. lanæ and Judgment there for the Plaintiff. A second Error assigned, because it is alledged pretii, &c. where it ought to have been ad valentiam: Sed non allocatur; For it is good both ways. Thirdly, because the Writ original was, de quibusdam bonis & Catallis; and he doth not shew any at all in the Writ: Sed non allocatur; For difference is where a Writ is brought for one thing only, There mention is made in the Writ of the nature of it; But when the demand is of divers things, for the brevity of the Writ, it is de quibusdam bonis & Catallis, and to express the certainty of them in the Count: In the same manner it is in Trespasts, and so are all the Presidents. Fourthly, for that the Ven. fac. is award de vicineto Civitatis Coventriæ, which ought not to be, for Civitas Covent. being in the margent, is intended the County; Therefore as a Venire facias ought not to be from a County, so it ought not to be from a City; and thereof the Court much doubted, and caused

Dier 121. b.
Ante 148.
F.N.Br. 88. l.
m.

Pol. 654.

1 Cr. 165.
2 Rol. 622.
Post. 493.

a search to be made of the Presidents in the Common Bench, and Kings Bench for this point: And upon view of Presidents in all places besides London, no mention is made of the Parish or Ward; And all Ven. fac. are awarded de Vicinet. Civitat. which is intended as well de Civitate it self, as de vicineto infra jurisdictionem of the City; And so it is de vicineto Eborum, Norwich, Sarum, Bristow, Exon, and all other Cities which are Counties in themselves: And this exception was taken in the Common Bench; And upon advisement they resolved it to be good enough; and so was done here, and the Judgment affirmed. Vide 7 H. 4. 13. 8 H. 5. 10. 10 Ed. 3. 27. 10 H. 6. 19. Coke l. 6. fol. 14. Arundels Case.

Lutterel *versus* Weston.

(5)
1 Rol. 507. 8:

1 Cr. 234.
Ante 301.

Co. Lit. 45. b.

T Respals: Upon a special Verdict the Case was, The custom of the Manor of Carhampton was, That if a Copyholder lets his Lands for a longer time than a year, they shall be forfeited: A Copyholder makes a Lease for a year, excepting the last day of the year; and so from year to year, excepting the last day of every year, as long as he lived: And whether that were a Lease for years to cause a forfeiture, was the question; For it was not a Lease for an entire year, for there is a day in every year excepted, and so a fraction of the time; And it is not a Lease for two years together; and therefore was pretended, it should save the forfeiture: But all the Court (without argument) resolved, that it was a forfeiture; For it is but a shift to avoid a forfeiture, and in Law is no avoidance; For it is a certain Lease for two years excepting two days, which is a lease in effect for more than one year; and although there be intermission of a day, yet that is not material; and by such means as he may make a lease for two years, so he may for twenty; which the Law will not permit: Wherefore without argument it was adjudged for the Plaintiff.

Sir Walter Chetwid *versus* Meefton.

(6)
1 Rol. 57.
Yelv. 220.

Action for words; Whereas he was Justice of Peace in the County of Stafford, and one Hickman complained unto him of divers misdemeanors committed by the Defendant, and was sworn before him: Whereupon he bound the Defendant to appear at the Quarter Sessions: That the Defendant spake of the Plaintiff these words, By your means I had wrong at the Sessions, for you caused Hickman to swear against me a thing that was not true, innuendo the said Dath: The Defendant pleaded Not guilty, and found against him: And now moved in arrest of Judgment, that the words be not actionable.

But

But all the Court resolved, that the Action well lay; For those words toucht him in this place, in charging him of procuring one to take a false Oath before himself: Wherefore it was adjudged for the Plaintiff.

Biggins *versus* Tytherton, Mich. 9 Jac. Rot. 626.

DEbt upon an Obligation; and demands 30 l. Upon hearing of the Obligation, it was entred in hæc verba; Noverint, &c. ⁽⁷⁾ 2 Rol. 147. Yelv. 225. Ante 290. Teneri, &c. In trigintate libris, with the usual words in all Bonds, only that word Trigintate for Triginta. And whether it were a good Bond, and whether by this variance the Declaration was not ill, was demurred in Law; And afterward adjudged for the Plaintiff. 2 Rol. 147. Post. 335.

Barnard *versus* Godscall.

COvenant upon an Indenture, of demise of a house to the Defendant: The breach assigned was, For not repairing ⁽⁸⁾ 1 Rol. 522. the house within a month after warning given the first of January, 9 Jac. There being an expresse Covenant on the part of the Lessee, for himself, his Executors and Assigns, that he would repair within a month after warning. The Defendant pleads, that long time before that warning, viz. 3 Jac. he assigned over his term to J. S. who had paid his Rent always afterward to the Plaintiff: And the Plaintiff accepted thereof, and avers performance of all the Covenants until the Assignment: And thereupon the Plaintiff demurred; For this Assignment doth not take from the Lessor his advantage of the expresse Covenant. And notwithstanding his acceptance of the Rent by the hands of the Assignee, yet he may charge the Lessee or Assignee at his election. And of that opinion was all the Court: Wherefore without argument it was adjudged for the Plaintiff. And Williams said, he knew it to be so adjudged when he was a Serjeant, upon a Demurrer in the Common Bench: And in this Term there was another Case betwixt Varnis and Goodcheape, where like Writ of Covenant was brought against Lessee for years, upon an expresse Covenant for Reparations: And such a Plea pleaded, and a Demurrer thereupon; and adjudged accordingly for the Plaintiff. 1 Cr. 580. Post. 522. 1 Rol. 522.

Clun *versus* Fisher, Trin. 9 Jac. Rot. 664.

DEbt for 50 l. Rent reserved upon a lease for years: The ⁽⁹⁾ Co. 10. 127. a. Case upon Demurrer was such, Anne Bredon Tenant for life, made a lease for fifty years, if she lived so long; rendering annually during the term 200 l. quarterly, at Michaelmas, Christmas, the Annunciation, and Midsummer, by equal portions, or within

within thirteen weeks after every of the said Feasts. She dies after Mich. and within the thirteen weeks, and for the Rent due at Mich. before her death this Action was brought; and all this matter being disclosed in the Count, the Defendant demurred in Law: And the sole question was, whether this Rent were due, she dying after Mich. and before the end of the said thirteen weeks; And it was argued by Hedley for the Defendant, and Yelverton for the Plaintiff; And after argument at the Bar, Fleming Chief Justice, and Williams delivered their opinion, That this Rent was not due; For the reservation being in the disjunctive at the four Feasts, or within the thirteen weeks after every of the said Feasts, nothing is due until the end of the thirteen weeks, but there is only an election given to the Lessee to pay it at the Feasts, if he will; but until the end of the thirteen weeks he cannot demand it by distress or Action of Debt; And therefore is not any duty, and if the Ancestor makes such a Lease, and dies after Mich. before the end of the thirteen weeks, this Rent shall go to the Heir, and not to the Executor: And if the Lessor release all actions and demands after Mich. before the end of six months, this Rent is not released: but peradventure by a particular release, with precise words, it may be released: And if the Lessee makes a forfeiture, and the Lessor enters therefore in the interim betwixt Mich. and the end of the thirteen weeks, no Rent is due to the Lessor. And there is a difference betwixt this case, and the case of Barwick and Foster, quod vid. ante 233. &c. where a Lease made for 21 years rendering annually at Mich. or within forty days, such Rent, the Lease beginning at Mich. shall end there; and the Rent was due for the last year, although the year expired before the forty days; For the reservation being annually during the term, at the said Feasts or within forty days, it shall be expounded according to their contract at the end of every forty days during the term: But the Term ending at Mich. so as there cannot be forty days after, during the Term, The Law rejects that forty days at the last Feast; For that cannot be, and then it is due at the Feast, according to the contract of the parties: But here, the term being uncertain, depending upon the life of the Lessor, the Law respects the thirteen weeks as the Feasts; and as if she dies before the Feasts, it is not due, so if she dies after the Feasts and before the thirteen weeks end, it is not due by the contract: And if there be an eviction by elder title betwixt Mich. and the thirteen weeks, there is not any Rent due; For the reservation is at such days during the term: Wherefore, &c. Croke Justice to the contrary; For the Rent is reserved payable annually, and is a duty at the said Feast, otherwise it is not annually reserved, nor payable; And the addition, or within thirteen weeks, is but an enlargement of the day of payment, for the ease of the Lessee at his election; and he denied the Law to be so in the Cases put of the

Ante 228.
Post. 300.

Co. 10. 128. b.
Ante 288.
3 Cr. 575.
Ante 233.

Co. 10. 128. a.
Co. Lit. 262. b.

Ante 228.

the death of the Ancestoꝝ after Mich. where the eviction is after Mich. For he held that the Rent is due to the Executoꝝ, and not to the Heir, and is due notwithstanding the eviction after Mich. for otherwise the intent of the parties to have an annual reservation is destroyed, if the Rent be not due until a year and a quarter after. Et adjournatur. Vide 3 & 4 Phil. & Mar. Dy. 142. & 32 Eliz. Smith & Bustards Case. *Note*, afterwards it was adjudged for the Defendant.

Lovelace *versus* Jeniper, Hill. 9 Jac. Rot. 1375.

Error of a Judgment in the Common Bench upon confession: (10)
The Error assigned, for that the Writ was Debt for 40 l. The Capias was awarded, and all the Processes accordingly, until the return of the Pluries Capias; And then the entry was, Quod querens obtulit se in placito debiti 40 s. and the Defendant made default, and thereupon an Exigent awarded: And the Defendant appeared, and pleaded, and afterward confessed the Action, that it was a discontinuance upon the obtulit se in placito debiti 40 s. The Process being awarded upon that Roll, there is not any continuance as to the Plea of Debt of 40 l. For it may be, that there were such several Actions of Debt then depending: But it was resolved to be no Error, for the appearance hath saved it; For as appearance saves default in mean Process, so this saves the defaults of the continuance by the obtulit se: And if the obtulit se had been in placito debiti, omitting any sum, it had been good; so mentioning another sum, it is clearly good: Wherefore the Judgment was affirmed.

Merrell *versus* Smith.

Error of a Judgment in the Common Bench in an Eject. firm. (11)
The Error assigned; For that the first Declaration was, that Tho. Eyre the 25 March, 6 Jac. let to the Plaintiff lands in Hoxe in Comit. prædict. for seven years; By vertue whereof the Plaintiff entered and was possessed, until the Defendant, postea, scilicet, Anno 6 supradict. entered and ejected him (so there is not any day mentioned:) After Imparlance, (as the course of the Common Bench is:) the Plaintiff made a second Declaration, and there (without any space made) the ejectment is supposed to be, 26. Maij Anno supradict. And the Writ was brought of this ejectment, Mich. 7 Jac. and thereupon the Defendant pleaded Not guilty, and found against him, and Judgment for the Plaintiff; And whether this were erroneous, because no day of Ejectment was mentioned in the first Declaration, was the question: But it was objected, and so agreed by the Court, That the first Declaration is the principal, and material Declaration, and the second is but a recital of the first; And if any matter of substance be omitted in

in the first, it cannot be added or amended by the second; for that begins with an alias prout patet, so it is but a mere recital; And therefore if the first be not good, although the second be good, and he plead thereto, and the trial is thereupon, yet the Judgment is erroneous: But all the Court held, That as this Case is, the first Declaration is well enough; for he declares of a lease the 25th of March, 6 Jac. which is the first day of that year; And the Declaration quod postea, scilicet 6 Jac. the Defendant ejected him, is certain enough for the year wherein he made the ejectment; So as it appears, that it was after the lease made, and in the same year of 6 Jac. wherein the ejectment was, and the Action is brought, Ann. 7 Jac. and the ejectment being made between the making of the lease and the Action brought, is good enough, although there be not any day certain alledged, and the certainty of the day is in the second Declaration; and the Verdict finding him guilty of the ejectment: The day of the ejectment is not material, it being before the Action brought: whereupon the Judgment was affirmed.

Ante 96.

Gyll *versus* Glas.(12)
Yelv. 227.

Error of a Judgment in the Common Bench; where Glas brought an Action of Debt, for Rent reserved upon a lease for years, made by himself: The Defendant pleaded, that the Plaintiff nihil habuit in tenementis prædict. tempore dimissionis prædict. The Plaintiff saith, quod habuit in tenement. prædict. And thereupon being at Issue, and found for the Plaintiff, and Judgment for him, it was now assigned for Error, that this Replication was not good; for he ought to have shewn to the Court what estate he had tempore dimissionis, so as the Court might adjudge, that he had good authority to demise; And the replying generally, Quod habuit, &c. is not good, nor is any Issue, and therefore the Judgment erroneous; And all the Court held, that the replication was not good, and that the Defendant might well have demurred for that cause: But the Defendant having joyned Issue, and the Verdict finding for the Plaintiff, it is now an Issue; and the Verdict hath made the Replication good: for the Court is now ascertained that the Plaintiff had good authority and estate to demise: Wherefore the Judgment was affirmed. Vide Co. lib. 9. fol. 60. Salmons Case.

Post. 315.
Ante 87. 221.
Ante 133.

Ante 304.

Lewis *versus* Cawardly in the Exchequer-Chamber.

(13)

Action for these words, Thou didst set upon me, and tookest away my purse with 20 marks in it, go with me before a Justice of Peace, I will charge thee with Felony; Adjudged that the Action well lay, and thereupon Error brought in the Exchequer Chamber, that the words were not actionable: All the Judges and Barons agreed, that the words are very slanderous, and tant amount as I do charge thee with Felony: wherefore the Judgment was affirmed.

Post. 315.
Hob. 305.
1 Cr. 277.
3 Cr. 890.

Good-

Goodson *versus* Duffield, Hill. 9 Jac. Rot. 232.

ERror of a Judgment in the Court of Pypowders in Rochester, (14)
 in Debt, upon an Obligation of 300 l. dated the 4th of May, 1 Rol. 545.
 9 Jac. And the Action brought thereupon 24. Decemb. 9 Jac. The 2 Rol. 271.
 Defendant pleaded payment the same day, and Issue thereupon,
 and found for the Plaintiff; and Judgment accordingly. And the
 Error assigned, for that suit cannot be in the Court of Pypowders,
 nor upon an Obligation made at another day; but they ought to
 sue there for Contracts, and things arising in Fairs and Markets;
 And it is a Court for those causes, and not for any other: But it
 was thereto answered, and resolved by the Court, That true it is
 properly a Court of Pypowders is for Fairs and Markets, and for
 causes arising within Fairs and Markets, and not for any other; 4 Inst. 272.
 But a Court of Pypowders, so termed for the spād thereof, may be 1 Cr. 46.
 by custom in Villis or Burroughs, for any causes, as debts upon 1 Rol. 545.
 Bonds, or otherwise; For they are Courts raised by custom and Co. lib. 10. 73.
 prescription, and may be for any causes done at any time, being
 transitory and personal; and so they be in divers Cities, as in Bristol
 and Gloucester: And the Record was cited Mich. 8 Jac. Rot. 146.
 between White and Hunt; where such a Judgment in Gloucester
 was affirmed to be good; and Hill. 33 Eliz. between Perd and 3 Cr. 256.
 Chambers, where such a custom was alledged to be in Canterbury;
 and holden good; And the Record was here, Curia Domini Regis
 pedis pulverisati tent. apud Civitat. Roffens. coram Majore & duo-
 bus concivibus, secundum consuetudinem Civitat. a tempore cujus,
 &c. Ac secundum privileg. & liberat. &c. concessa & confirmata,
 &c. A second Error assigned ore tenus was, That this stile of the
 Court, that it is by custom, and by Charters of the King and his
 Progenitors concessa & confirmata, &c. is repugnant in it self;
 For the Charter determines the prescription: Sed non allocatur;
 For a Court being by prescription, is not taken away by the grants
 and confirmations of Kings; But they may use their Charters 2 Rol. 271.
 as confirmations, or as grants, or may claim those liberties by
 prescription, notwithstanding such Charters; For, as Fleming said,
 every Corporation useth in every Kings time to take a new confir-
 mation of their liberties; Otherwise they ought to plead upon a
 Quo Warranto brought for the using of their liberties, or in Eyre Co. 9. 23. a.
 allowance of them, else they be not justifiable. A third Error assign-
 ed ore tenus was, That the Court being (as it is in the stile of the
 Court) Coram Majore & duobus concivibus, the Venire facias is
 made returnable coram J.S. Majore vel deputat. meo, & coram duo-
 bus concivibus at such an hour; which is not good: For it doth not
 appear, That either by custom or Charter the Major might make a
 Deputy, or that process should be returnable before the Deputy;
 And therefore the Venire facias is misawarded, and not aided by
 the

the Statutes of *Feofailes* ; and the Court seemed to incline to that opinion ; But wished the parties that the Defendant should put in new bail into this Court ; And that the Plaintiff should declare *de novo*.

Johns versus Smith, Pasch. 9 Jac. Rot. 364.

(15)

T Respals of false Imprisonment for fourteen days : The Defendant justifies, for that the Court of the Marshall was an ancient Court, to be holden before the Steward and Marshall of the Hostel of the King ; which Court hath Jurisdiction to hold all Pleas of all Trespasses within the Aerge ; And that there were divers Officers, called *Portatores virgarum* within the Aerge, who were Officers of the Court ; And that all Precepts have been used, from time whereof, &c. to be directed to the Marshall to be executed by himself, or such Officers by his commandment ore tenus : And shews, that he himself affirmed a plaint of Crespals in the Marshalls Court against the Defendant for Crespals within the Aerge : And thereupon a Precept was made 23. Septemb. 7 Jac. at S. within the Aerge, to the Marshall to take the Plaintiff *ad Habendum* his body at the next Court, &c. and that the Marshall commanded one Riseby, being *Portator Virgæ* there, to take the Plaintiff, *Ita quod*, &c. and that the Defendant shewed the Plaintiff unto him, and came in aid of him, &c. and so justifies, &c. And it was thereupon demurred ; The first exception taken was, because the prescription is to hold all pleas of all causes within the Aerge, and it is not shewn between what persons, and therefore it is not good ; For it is against the Statute of 28 Ed. 1. that they should hold any Pleas unless betwixt persons of the Hostel. A second exception, for that the precept or *Capias* is returnable at the next Court, and it is not upon any day certain, so he might be detained in prison a long while, not knowing when the Court shall be holden : And all the Court resolved, that such awarding of process was ill ; and he who was arrested upon it, might maintain an Action of false Imprisonment : wherefore for this cause principally, It was adjudged for the Plaintiff.

1 Cr. 318.
Co. 6. 20. b.
Co. 10. 74. b.

1 Cr. 254.
Post. 517.

Co. 10. 76. a.

Thinne versus Rigby, Trin. 9 Jac. Rot. 646.

(16)

ERROR in the Exchequer-Chamber, Upon a Judgment in the Kings Bench, in an Assumpsit, for non-performance of an Arbitrement ; The Error assigned was, For that the Arbitrement was void in hoc, that the submission being concerning the cutting down of certain Trees in S. They awarded that the Defendant should have them ; And that he should give security to the Plaintiff for the payment of 16 l. at two days : The Plaintiff assigns the breach, that he did not give security, nor pay the money ;

money; And it was agreed by all the Judges and Barons, that it was a void arbitrement for the uncertainty, not shewing what security he should give, whether by Bond or otherwise; and every arbitrement ought to be certain, that the party may know what he is to perform. Vide Co. 5. fol. 77. 8. Secondly, the arbitrement was, that the Defendant should leave so many of the trees to the Plaintiff for housebote and hedgbote, as the Arbitrators upon advise with Counsel at the next Assises should appoint; And for this cause it was held to be void, for they did not make a perfect arbitrement, and they might not reserve authority to themselves, to execute at a future time: Wherefore the Judgment was reversed.

Post. 585.
Hob. 218.

Kirby *versus* Hansaker.

ERror in the Exchequer-Chamber of a Judgment in Debt, upon an Obligation of 600 l. The Error assigned, because there was not a sufficient breach alledged; For the condition being, that he should enjoy such Lands without eviction; The breach was assigned in the Recovery by verdict in Ejectione firmæ upon a Lease made by one Essex, and doth not shew what Title Essex had to make the Lease, but avers, that Essex had good Title; and it might be he had Title derived from the Plaintiff himself, after the Obligation made; and therefore he ought to shew, that he had good and *Eigne* Title before the Lease made: And for this cause all the Judges and Barons held the Replication to be ill; For it ought to comprehend a full and manifest breach, otherwise it is not good: And although in this case Issue was taken, that the recovery was by Covin, and not by lawful Title, and found for the Plaintiff, that it was not a Recovery by Covin, but by lawful Title; yet that helpeth not, the Replication being ill: Wherefore it was Reversed. Note, This exception was taken in the Kings Bench after Verdict before Judgment, and disallowed, because the Verdict had made it good. Also another exception was taken there, For that the Trial was by a Jury of the County of *Berks*, where it ought to have been by a Jury of the County of *Middlesex*, the Trial being at Exchequer-Bar, the question being whether the recovery were by Covin; But because the question was not only of the Covin, but whether it were upon true Title (for then it could not be by Covin) Therefore the Trial by the Jury of the County where the Land lay was good enough; But to this point no answer was made upon the Writ of Error.

(17)

Post. 425.
1 Cr. 5.
Hob. 12.

Ante 283. 312.

Holland *versus* Stoner.

ERror of a Judgment in the Kings Bench in an Action for these words, Thou art a lewd fellow, thou didst set upon me by the high-way and take my purse from me, and I will be sworn to it. The

(18)

3 Cr. 890.
Ante 312.
1 Cr. 277.

§ 2

Error

1 Cr. 277.
Hob. 305.

Error assigned was because an Action lay not for these words; For he doth not charge him with Felony, nor with robbing of him, or with any felonious taking away his purse, and it may be he took it away in jest, or for some other cause, and it is not any direct slander; And of that opinion were all the Judges and Barons: Wherefore the Judgment was reversed.

Denbaugh *versus* Woodley, Hill. 9 Jac. Rot. 1111.

(19)
Co. 10. 102. b.
3 Cr. 305.

Co. 10. 103. a.

Error of a Judgment in Trespass: The Error assigned; Because at the Nisi prius one Jury-man only appeared; and a Tales de circumstantibus was awarded, which was in this manner returned upon the Pannel, viz. Nomina decem talium de novo appont. And there were eleven names returned, and eleven sworn, which cannot be; For if the Justices had authority when one only appeared to award Tales de circumstantibus; They ought to award decem tales & octo tales, and not upon decem tales, to return undecem. But all the Judges and Barons said, they might award Tales de circumstantibus, to make a full Jury when one only appears; And the Tales shall not be ten Tales, and afterwards eight Tales, as in Banco, but generally a Tales de circumstantibus; and here the addition decem is void, and that word ought to be stricken out, and then it is well enough: Wherefore they awarded, that it should be amended, and the Judgment was affirmed; And they said, the common course in all Circuits was to award Tales where one Juror only appeared.

Fox *versus* Inkes, Hill. 9 Jac. Rot. 948.

(20)

3 Cr. 256.

Ante 35.

Debt for 800 l. For that the Defendant per scriptum suum obligatorium 22. April, 20 Eliz. Cognovit se teneri to the Plaintiff in 800 l. Solvendum cum requisitus esset. The Defendant demands Oyer of the Obligation, which is entred in hæc verba;

of a Statute Merchant acknowledged at Salisbury made by him and three others jointly and severally, Solvendum at the Feast of St. George the Martyr, Anno 1580. The Defendant pleaded, that the Clerk named to be the Clerk of the Statutes there, and to keep one piece of the seal, was not a Clerk deputed; And upon this, the Plaintiff demurred: And upon the reading the Record, it was moved, that this plea was insufficient, which was not much defended; But it was shewn, that the Declaration was clearly ill, because he declares upon a Statute Obligatory, solvendum upon request; And it now appears to be payable at a day certain, which was held by the whole Court to be an incurable fault: It was then moved, that the Plaintiff might discontinue his suit; For otherwise he should by that slip be barred of his Bond: And it was replied by the Court, That the Plaintiff after a Demurrer cannot discontinue it, without the Courts

Courts licence; and although the continuance be not entred, it may be entred at any time, and the Defendant by licence of the Court, for his own advantage, may enter the continuance: Wherefore because the Suit here is upon a Statute acknowledged 34 years since, wherein the Defendant was but a surety, the Court gave further day until the next Term; That in the interim the parties might treat and compound; And that the Defendant might enter the continuance.

Doctor Leafield *versus* Helicar.

T Respals for Cythes taken: The Defendant Justifies, as servant to a Patentee of the Queens for years, and by his command; and doth not say, hic in curia prolata: And for this cause the Plaintiff demurred in Law generally, and Judgment for the Plaintiff, and now Error was brought and assigned, for that he being but a servant, the Letters Patents from the Queen do not belong unto him, and therefore his Plea without shewing them was good: But all the Justices and Barons conceived, in regard he derives his Title from the Patentee, not by act in Law, but by his command, that he ought to shew the Letters Patents, as well as he who claims interest under the Patent by Assignment: But he who claims interest under an Act in Law; (for that he had no means to compel the Patentee to shew it) may Justifie without shewing it: Wherefore the Judgment was affirmed.

(21)
Co. 10. 88. 2.

Co. 10. 99. 2.
Ante 70.
Ante 292.
Post. 300. 673.
Ante 109.
1 Cr. 209.

Termino

Termino Hillarii,

Anno decimo J A C O B I Regis in Banco Regis.

Arnold *versus* Bidgood, Hill. 10 Jac. Rot. 166.

- (1) **D**Ebt upon the Statute 2 E. 6. c. 12. for not setting out Tythes. The case was, A man being possessed of a lease of Tythes in right of his wife as Executrix to her former husband, grants totum jus, titulum & interesse suum de & in decimis prædictis. After Verdict for the Plaintiff (who claimed under the said Grant,) It was moved in arrest of Judgment, that the Declaration was not good, because the Plaintiff had not set forth any good title to enable himself to the Tythes. And the books of 10 E. 4. 1. & 19 H. 6. 40. were cited to that purpose: But the whole Court unanimously resolved, that the Grant was good, and the lease he had in the Tythes in right of his *Feme* did thereby pass: For he granted totum jus, titulum & interesse suum de & in decimis prædictis; And by Doderidge the word *Suum* doth import a propriety in possession, and is all one as if he had specially named the same in the Grant; Nor could it be more certainly named or expressed. There was then an objection made out of the Proviso in the Statute for dissolutions, that all Leases made by an Abbot within a year before the dissolution, should be void; and this Lease was pretended to be so, and therefore void. But it was thereto answered, that here the Issue was only, whether he were discharged of Tythes or not. And the Jury gave their Verdict directly, that at the time of the dissolution there was not any discharge of Tythes: And this Lease being but an inducement only to the Title of the Plaintiff, the Issue therefore is well enough: But if in this case there had been any mispleading or mis-trial, the Court held clearly it was aided by the Statutes of 32 H. 8. & 18 Eliz. cap. 14. and cannot be quashed after Verdict: Whereupon Judgment was given, and entered for the Plaintiff.

3 Cr. 6.

Post. 318. 362.

Post. 362.

Shecomb *versus* Hawkins.

- (2) **E**jectione firmæ: Upon a special Verdict the Case was: Mrs. Luttrell being Tenant in Fee of the Manor of D. which was then in Lease for years, levied a Fine thereof to the use of her self for life, and after to the use of her eldest Son in Tail, reserving power to her self to make Leases at any time for 21 years: Before the Lease in being expired she made another Lease to J. S. (under whom the Defendant claimed)

Yelv. 222.

for

for 21 years, to begin after the determination of the former lease, and died. The first Lease expires; the Son enters, and makes a Lease to the Plaintiff: And it was adjudged for the Plaintiff; For it ought to have been a Lease in possession, and not an interest to begin in futuro, or reversion after another estate determined; For then she might by infinite Leases detain those in reversion out of possession for a long while; which is against reason, and the intent of the parties. Vide Coke 6. fol. 33. a. Post. 347.

Austin *versus* Austin, Trin. 10 Jac. Rot. 3558.

Action *sur Trover*: The Defendantt pleaded, that before the time, wherein the Plaintiff supposeth the goods to come to the Defendants hands; One S. A. was possessed of them, and amongst other goods sold them to the Defendant, but retained them in his own hands, and afterwards sold them to the Plaintiff, by reason whereof the Plaintiff was possessed, and afterwards lost them, and they came to the Defendants hands, who converted them, prout, &c. whereupon the Plaintiff demurred; And it was held by the Court, to be an ill Plea; For it amounts to a Not guilty: And it was doubted whether the Court should compel the Defendant to plead Not guilty, or award a Writ of Inquiry; But at last it was resolved, that a Writ of Inquiry should be awarded. (3)

Ante 122.
1 Cr. 157.
Ante 165.

Termino

Termino Paschæ,

Anno decimo J A C O B I Regis. in Banco Regis.

Ketleys Case.

(1)

DEbt brought upon a Lease for years, for arrears of Rent against R. The Defendant in Bar pleaded Infancy at the time of the Lease made; whereupon the Plaintiff demurred. The sole question was, whether a Lease made to an Infant were void: And it was objected that it should be void, because it might be prejudicial unto him, who had not sufficient discretion for the managing of the Land; and the Rent may be greater than the value of the Land. But the Court held it to be voidable only, at his election; For if it were for his benefit, it shall be no ways void: But the Infant at his election may make it void, by refusing and waiving the Land, before the Rent-day comes; For then no action of Debt will lie against him: But in the principal case it was not shewed, that the Rent was of greater value; and the Defendant was of full age before the Rent-day came: Therefore it was adjudged for the Plaintiff.

Higgins Case.

(2)
1 Rol. 897.

Post. 549.
Ante 143.

DEbt brought by Higgins, &c. It was held by the Court, That if one be arrested upon Process in this Court, and puts in bail, and afterward the Plaintiff recovers, and the Defendant renders not himself according to Law, in Safeguard of his bail; ~~On the~~ Plaintiff may at his election take execution, either against the Principal, or Bail: But if he takes and arrests the Bail, although he had not full satisfaction, he shall never afterwards meddle with the Principal: But if two be bail, although one be in execution, yet he may also take the other: But if the Principal be in execution, he cannot take the Bail.

Geulh versus Mynns.

TRESPAS: Quare vi & armis clausum fregit, &c. The Defendant justifies upon a report, that a vermin (called a Badger) ⁽³⁾ was found there ad damnum inhabitantium, by reason whereof he uncoupled his Hounds in the place where, &c. and hunted there, and found the Badger, and chased him, until he earthed him in the place where, and thereupon digged the ground and took the Badger, and killed him: And that afterwards he stopped up the earth again, Quæ est eadem transgressio, &c. and demand Judgment: Whereupon the Plaintiff demurred. And it was held by the Court, that the Action well lay; For although the Common Law warrants the hunting of such ravenous Beasts of prey in another mans Land, because the destroying of such creatures is profitable for the publique: Yet the Law requires, that such things be done in an ordinary and usual manner: And this is confirmed and explained by the Statute of 8 Eliz. cap. 15. For although the Statute gives reward for the killing of Vermine, yet it saith it must be with consent, and with reasonable Engins and devices: Therefore there being an ordinary course (viz. hunting) to kill the Badger, the digging for him was unlawful. Nicholas Case in ² Rol. 558. 36 & 37 Eliz. for a Fox is expressly to that purpose.

Pit versus Webley.

PROHIBITION was prayed upon the Statute 23 Hen.8. cap. 9. for ⁽⁴⁾ being cited out of the Diocess, contrary to the Statute. The Case was, Pit had a Warrant from a Justice of Peace, and served it upon Webley, as he was coming from Church from a Sermon, upon a week day: Whereupon Webley libeled against him in the High Commission Court, where the cause of arrest was allowed; But for the contempt, the Court there gave Webley 6 l. costs; and for those costs there assessed, a Prohibition was prayed. But Man the Secondary informing the Court, That he never knew of any Prohibition grounded upon a suggestion grounded upon this Statute, there being many exceptions therein; The Council for the Plaintiff in the Prohibition thereupon relinquished their surmise upon the said Statute, of his habitation within a peculiar Diocess, and framed the suggestion upon the Statutes of 1 R.2. cap. 15. & 50 Ed.3. cap. 5. which prohibit arrests in time of Divine Service, Et in eundo & redeundo to and from the Church; and thereupon prayed the Prohibition. ¹ Cr. 79. 162. 339. But it was said, That those Statutes are, where the matters are betwixt one common person and another, but not where it concerns the King and a common person, as here it did; this arrest made being at the Kings Suit. And to this opinion the Court seemed to incline, and that there was just cause for a Prohibition: But

C t

further

further day being given, the parties mean while agreed.

Hankinson *versus* Sandilaus, Mich. 10 Jac.

Rot. 461.

(5)
2 Rol. 148.

DEbt upon an Obligation of 40 l. Upon Oyer of the condition thereof, the case was; Two bound themselves, or any of them, their Heirs, Executors, or either of their Heirs, &c. And the Action was here brought against one of the Obligors only, the other then living: whereupon the Defendant demurred in Law. And whether this Bond be joynt and severall, or only a joynt Bond, to be sued against them both, was the question: It was urged for the Defendant, that the Obligation was sealed and delivered by both of them joyntly, and was a joynt Bond, and the words subsequent, or either of us, (in respect one of the Obligors was to be discharged thereby, it being incertain which of them) was therefore void. And it differed from the Case in Dy. fol. 19. where three were bound in an Obligation, *Obligamus nos, & utrumq; nostrum, &c.* The Bond there is joynt and severall, all of them being so bound at the beginning: But it is not so here; For first, both of them are here bound, and afterwards follow these words, *Or either of us*; And the Obligee hath accepted it as a joynt Debt, and so ought to pursue the same: But it was held by the Court, that the acceptance here is not material, as to the election, but it still remains at the pleasure of the Obligee to sue them joyntly and severally. And the joynt delivery of the Bond shall not make it to be a joynt Bond, and not severall; The same being by the Law joynt and severall: And in this case *Et* and *vel* are all one. And the Court thereupon overruled the Demurrer; And Judgment was given, and entered for the Plaintiff.

Dier 310.

Termino Trinitatis,

Anno undecimo JACOBI Regis in Banco Regis.

Doyley *versus* White, Hill. 6 Jac. Rot. 853.

Action for the False Imprisonment of the Plaintiffs wife : (1)
 the Case appeared to be, One Leonard Loves brought
 an Action of Trespas in the Common Bench against
 Julian Goddard, widow, hanging the Suit, she takes
 Doyley to husband : Judgment was given against Julian Godard,
 and a Writ was directed to White the Defendant, being then
 Sheriff, Quod caperet Julianam prædictam, per nomen of Julian
 Godard, ad satisfaciendum prædict. Leonard. pro damnis, &c. The
 Defendant made a special justification, That at the time of the
 Action brought against her, she was Julian Godard, widow : But
 at the time when the capias ad satisfaciendum was executed, and
 she thereupon arrested and imprisoned, she was the wife of Doyley :
 Whereupon the Plaintiff demurred in Law, and it was adjudged
 for the Defendant : For the whole Court was of opinion, That
 if an Action be brought against a widow, who is found guilty, and
 before Judgment takes an husband, that the capias shall be award-
 ed against her, and not against her husband ; and in this Case of
 her subsequent Marriage with Doyley (He not being so much as
 once named in any part of the Record) if the Sheriff had returned
 that she now was married, he would have falsified all the proceed-
 ings : And therefore they resolved, that the Action was not main-
 tainable. I Cr. 232.

Matthew *versus* Crafs.

Action, For these words ; Thou art an Whoremaster, for thou
 hast lain with Browns wife, and hadst to do with her against
 a Chair ; By reason of which words he lost his Marriage, ad dam-
 num, &c. After Verdict for the Plaintiff, it was moved in arrest
 of Judgment, that the words were not actionable, but exami-
 nable only in the Spiritual Court : And that this was the
 first president, where loss of Marriage was ever laid for words
 spoken of a man ; and so, not like to Anne Davies Case, Co. 4. fol.
 16. But it was conceived by the Court, that there was not any
 difference betwixt the Cases, as to the hinderance of Marriage
 either of a man or of a woman : Which being alleged in this
 Case, and a tempozal loss and damage to ensue thereby, al-
 though (2)
 I Cr. 269.
 Post. 422. 499.

Ante 213.

though the Crime is to be punished in the Ecclesiastical Court, yet these words give the Temporal Court Jurisdiction, and makes them here actionable: So the calling of one Bastard, is triable and determinable in the Spiritual Court; yet when matter subsequent is laid which is triable in a Temporal Court, (as to entitle himself to be Heir, or where he shews some possibility of being Heir) this maketh the calling of him Bastard to be actionable at the Common Law. So here, by reason of the allegation of his loss of Marriage, by these words spoken, the Action is maintainable; And Judgment was given for the Plaintiff.

The King *versus* Sorel.(3)
2 Rol. 80.

AN Endictment, For stopping of water, was quashed as insufficient; The words being, Quod quædam pars aquæ was by him stopped; which words are too incertain: For by Croke Justice, it ought to have been Quædam pars terræ aqua coopertæ; and by Doderidge, Magna pars aquæ, according to Littrels Case, Co. 4. fol. 88. b. & Dyer 248. which were to that purpose cited: Whereupon the party endicted was discharged.

Rawlins *versus* Barret, & Porter *versus* Agar.(4)
1 Rol. 750.
3 Cr. 356.
Co. 11. 38. b.

IT was resolved this Term by all the Court in these Cases, That a Writ of Error doth not lie upon the first Judgment, either in a Writ of Partition, or Account.

Kipping *versus* Swayn.

(5)

Post. 362.

DEbt upon the Statute of 2 Ed. 6. for not setting forth of Tythes; and declares, That he was Proprietor of the Rectory of B. in the County of S. for the Term of seven years; and that the Defendant was Occupier of lands within the same Parish for six months, by a Demise made 10. Martij, 10 Jac. and that the Defendant 27. Aug. Anno prædicto did cut his Corn there growing; and upon the 10th of September next following, the Defendant, being Subditus dicti Domini Regis, carried away the said Corn, not setting out the tenth, according to the Statute: The Defendant pleaded Nil debet, and it was found for the Plaintiff, and now moved in arrest of Judgment; First, that the Plaintiff by his own shewing had no cause of Action against the Defendant; for the Defendants Interest in the Land was determined before the Tythes were carried away: But the Court held it to be no Exception; for although his Interest in the Lands was determined, yet he remained Owner of the Corn: For if Corn be cut down, although a stranger take it away before

fore severance, yet an Action by this Statute will lie against him. Another Exception was taken, because the Plaintiff said, he was Subditus dicti Domini Regis; For the Statute refers Subditus to his politick capacity; But dicti goes to his natural and sole capacity; And so the force of the Statute should be determined by his death. And this was held by three of the Judges to be a fault incurable. But Houghton doubted thereof. Et Adjournatur.

Termine

Termino Michaelis,

Anno undecimo JACOBI Regis in Banco Regis.

(1)

Memorandum, That this Term Sir *Edw. Coke* Chief Justice of the Common Bench, was made Chief Justice of the Kings Bench, and had only a Writ to command him to attend in that service, and no Patent, which was openly read, and then he took his Oath to execute that Office; And Sir *Henry Hobert* the Kings Attorney, was made Chief Justice of the Common Bench; Sir *Francis Bacon* the Kings Solicitor made Attorney-General; And *Henry Yelverton* made Solicitor.

Rogers versus Parry.

(2)

A Sumpsit: In consideration of 10 l. he promised to make him a Lease for 21 years 11. April, 9 Jac. And that the Defendant, being possessed of an house adjoining, whereof a shop was parcel, assumed that he would not suffer the Trade of a Joyner to be used in the said shop during the said Term: And alledges in fact that he paid the ten pounds, and that the Defendant the same day Demisit tenementa prædicta for 21 years in forma prædicta: And that upon the 10. April, 10 Jac. and for the year following, he permitted one J. S. to use the Trade of a Joyner In Shopa, parcella Messuagii prædict. contra formam assumptionis prædict. After Non assumpsit pleaded, and Verdict for the Plaintiff, it was moved in arrest of Judgment, that the Declaration was not good; Because he doth not say in Shopa prædict. nor that it was parcel of the house, tempore assumptionis; nor that the promise was made during the term: for the term may be surrendered: Sed non allocatur; For the term shall be intended to continue, unless it be otherwise shewn on the contrary part. Vide 21 H. 7. 32. Also the Shop being parcel, shall be intended always parcel: And contra formam assumptionis intends, that it was the foresaid Shop; And although he doth not shew that the demise was to the Plaintiff, yet because it is demisit in forma prædict. It shall be intended to be to the Plaintiff.

Dennis versus

(3)

Debt upon an Obligation: The condition was, whereas he was obliged to pay such a sum of money, at Newton Petrarch; If he paid it at the day at Newton aforesaid, that then, &c. The Defendant pleadeth payment at the day at Newton aforesaid,

said, the Ven. fac. being of Newton only, without saying Petrarch ;
and a Venire facias de novo.

Moore *versus* Goodgame.

ERror of a Judgment in the Common Bench in Replevin ; (4)
The Error assigned was, because in the Replevin, the Plaintiff
alleged the taking to be apud Warfield in a place called East-
medow : The Defendant saith, that Locus in quo is three Acres
of Medow in Wargrove, which is the freehold of the Lady Periam,
and made consuance as Bailiff unto her ; The Plaintiff replies
and entitles himself to that Land as a Copyhold parcel of the
Manor of Wargrove : And upon long pleading in Bar to the
Avoyny, Replication, Resoynder and Surrejoynyder, the Issue was,
Whether Infra Manerium de Wargrove talis habetur consuetudo ;
That the said Land in Warfield is a Manor of Warfield demised
and demisable by Copy of Court Roll, prout, &c. And this was
tried by a Ven. fac. de vicineto Manerii de Wargrove, and found
for the Plaintiff, That there was within the Manor of Warfield
such a customary Manor : And it was resolved by the Court, that
within one Manor there may be another Manor demisable by
Copy, and that within that Manor there may be customary Te-
nants : For as well as there may be a Tenant at Will of a Man-
or at the Common Law : So there may be Tenant at Will,
according to the custom of the Manor : wherefore it was adjudged
accordingly for the Plaintiff. And Verdict of Error being brought,
Error was assigned, because the Ven. fac. was of the Manor, where
it ought to have been of the Manor of Wargrove and of Warfield,
which is a distinct Will of it self : Sed non allocatur ; For the Issue
being, whether within the Manor there be such custom, the Venue
shall be only of the Manor, and Warfield being parcel of the
Manor, shall be intended to be within it : Wherefore the Judg-
ment was affirmed.

Co. 11. 17. 2.

Ante 260.
Co. Lit. 58. b.
Co. 11. 17, 18.

1 Cr. 312.
Co. 6. 14.
Post. 328. 403.

The Earl of Bedford *versus*

TRespass ; For entering into Land in Lanygame : The De- (5)
fendant pleaded that the place where is three Acres par-
cel of a great Waste called Hope in Lanygame, parcel of the
Manor of Bishops-Taunton ; And that the Earl of Bedford was
seised in Fee of the Manor of Bishops-Taunton, whereof one
house and twenty Acres of Land in Lanygame, is customary and
Copyhold Land, demisable, &c. in Fee ; And that the Earl of
Bedford granted unto him the said Messuage and Lands by Copy,
&c. in Fee ; And that within the Manor is such a custom, that
every Copyholder of the said Manor should have Common
of Estovers in the said Waste called Hope, &c. and so justifies ;
And

Ante 327.
Post. 676.

And the Issue was upon this custom; and found for the Plaintiff, that there was no such custom: And it was moved in arrest of Judgment, that the Ven. fac. was awarded only of Lanygame, and not of the Hannoꝝ, as it ought to have been. And Doderidge held, that the trial was good enough; for the Copphold being in Lanygame, and the place where being in Lanygame, they of Lanygame may well try that custom; for the one part of the Hannoꝝ may well know the customs of the other part: But it being afterwards moved again, Coke Chief Justice, and all the Justices agreed, that it was a mistrial: For the Venue ought always to be of the place as large as the extent of the Issue; And the Issue being, whether there were such a custom within the Hannoꝝ, &c. The Hannoꝝ may extend into divers Wills; Therefore the Ven. fac. ought to be of the Hannoꝝ, and not of the particular Will within the Hannoꝝ. But if the Issue had been, whether the custom were for such Coppholders within the Will, there it ought to have been otherwise: Wherefore it was ordered, That a Ven. fac. de novo should be awarded.

Wheeler *versus* Heydon, Hill. 8 Jac. Rot. 1317.

(6)
2 Rol. 717. 8:

DEbt upon the Statute of 2 Ed. 6. for not setting out his Cythes, but carrying away his Corn, the Cythes not being set forth; And declares that one Thomas Rock, Parson of the Rectory of Scription, let unto him the Rectory for six years, if he lived so long and continued Parson there; And that the Defendant, being an Occupier of such Lands sown with wheat, within the said Parish, reaped and carried it away, the Cythes not being set forth, &c. And avers the life of the said Thomas Rock, and that he continues Parson, &c. The Defendant pleaded Non debet; And a special Verdict was given, that the Parson made the Lease for six years, if he lived so long; And the words, if he continued Parson, were not within the Lease; And they found all other points according to the Declaration; And if, &c. And hereupon it being moved and argued at the Bar, all the Justices (besides Haughton, who doubted thereof) held, that the variance betwixt the Lease in the Declaration, and the Lease found shall not prejudice; For it is all one in substance, although it varies in words: And the addition in the Declaration, If he so long continue Parson, is no more than what the Law speaks, for so the Law tacitely implies; And therefore the addition thereof is no variance in substance. It is also good enough for a second reason; For the Lease is not the ground of the Action, nor is the Declaration founded upon the Lease, but upon the carrying away of the Cythes; and for remedy of his wrong was the Action brought; And the allegation of the Lease is but an inducement to the Action: And the Jury finding that

Ante 70. 318.
Post. 362. 438.

That he hath a good Lease and a good Title to ground his Action, although it be not in the same manner precisely as he declares, It being found for the Plaintiff, he shall have Judgment. But if Debt had been brought upon this Lease for years, such variance peradventure would have been material, because the Lease is the ground of the Action; wherefore it was adjudged for the Plaintiff. *See* for the first point 40 Ed. 3. 3. 12 Ed. 3. Variance 77. And for the second point, Plow. 32 & 191. H. 6. 29. 3 H. 6. 25.

De la Hay *versus* Vaughan, Pasch. 11 Jac.

Rot. 416. vel 486.

Error of a Judgment in the Common Bench; For that the Plaintiff, being an Attorney in the Common Bench, sued an Attachment of privilege against the Defendant, and recovered against him by Non sum informatus. And the Error assigned, because the Plaintiff did not find pledges de prosequendo. And this being certified, and in Nullo est erratum pleaded, it was for this cause reversed. Vide 9 Ed. 4. 27. 18 Ed. 4. 9. 2 H. 7. 1. 12 Eliz. Dy. 288. postea fol. Vide 16 & 17 Car. 2. 8. (7)

Pyot *versus* the Lady St. John, Mich. 7 Jac. Rot. 3214.
in C. B.

Richard Pyot Alderman of London, as Assignee of Sir Oliver Cromwel, brings Covenant against Katherine Lady St. John. For that, whereas Sir Oliver Cromwel being seised in Fee of a Messuage in Bednall-Green, and possessed of a Lease for divers years yet enduring (shewing of what Lease and how he came thereunto) let both the Houses and the Courts, Orchards, and Gardens appertaining unto them, to the said Defendant for ten years by Indenture, wherein the covenants to repair the Houses, Edifices, and Buildings, with necessary reparations: and that she would maintain and keep Dimissa præmissa with Paling and Fencing, and at the end of the Term would leave Domus & alia præmissa, sufficiently maintained, repaired, paled, and fenced: And shews that by a Deed he granted to the Plaintiff the said Reversion in Fee, and by another Deed the Reversion for years: And that the Defendant attorned upon the several Grants; And that at the time of the Lease and Grant of the said Reversion, the Houses were well repaired; And that after the Grant upon him of the said Reversion, Diversa domus loca, parcella, & res eorundem tenementorum, & præmissorum decasuat, dirupta & fracta fuerunt, & in decasu devenerunt; Et diversa alia parcella & res eorundem tenementorum & præmissorum eisdem præmissis affixa abinde avulsa & asportata fuerunt, prout sequitur, &c. And instanceth in the pavement of the Court, the carrying away of the Locks and Keys of a Cupboard, the breaking of the Glasse in the windows, the
A u carrying

carrying away of a Shelf which was not shewn to be fixed, &c. And it was thereupon demurred, and adjudged for the Plaintiff; and upon Writ of Inquiry of Damages, entire damages were given, to 100 l. and Judgment accordingly, and thereupon Error brought: First, upon the matter in Law, because he having two Reversions, the one in fee, the other for years granted by several Deeds, and at several times, could not therefore have one action, but ought to have brought several actions. But all the Justices held, that it may well enough. And Coke said, that it was so resolved upon argument in the Common Bench; For one may have an action of Waste upon several Leases, and upon several Grants of a Reversion, and a Formedon upon several gifts; and upon the same reason he may have one Writ of Covenant. Secondly, it was objected, That the assignment of the breach is in not repairing of the pavement, which is out of the Covenant, for it is neither building, paling, nor fencing; and damages are given for it, and the damages be entire; Sed non allocatur; For it is within the intention of the Covenant, and it is quasi the building; and within the words, leave them sufficiently maintained, repaired, &c. And the not repairing may be matter of value, and much prejudice to the Lessor. Thirdly, it was alledged, that the assignment of the breach in Glass being broken, cannot be in Glass which is but cracked; and it is not within the intention of the Covenant, that such petty things should be a breach thereof; Sed non allocatur. Fourthly, it was alledged, That the carrying away of a Shelf which was not shewn to be fixed, was not any breach: Sed non allocatur; For it shall be intended, fixed: And it is said that diversæ res affixæ asporatæ fuerunt. Wherefore without argument the Judgment was affirmed.

Ante 68. 70.

Ante 129.

Rich *versus* Kneeland.(9)
1 Rol. 2.
Hob. 17.

Action upon the Case; whereas the Defendant was a common Bargeman, and used to carry for hire from London to Milton, and other places in Kent, That he delivered unto him a Portmantle and 30 l. therein to carry, and gave unto him 2 d. for the carriage; And that the Defendant tam negligenter custodivit. that it was taken from him by persons unknown, and so he lost it: The Defendant pleads (confessing the receipt) that he was a common Bargeman, but that he fearing to carry it, delivered it to J. D. to carry, and that he gave notice thereof to the Plaintiff, and he agreed thereto, and discharged him of the carriage; The Plaintiff traverses that he did not discharge him; And it was thereupon demurred, and adjudged for the Plaintiff; for the delivery by his assent is not material; But the only matter traversable is the discharge, which is issuable, and found for the Plaintiff. And Error being brought, was assigned; First, be-
cause

cause this Action lies not against a common Bargeman without special promise. But all the Justices and Barons held, that it well lies as against a common Carrier upon the Land. Secondly, they held, that the Traverse was good; wherefore the Judgment was affirmed.

Ante 2 6 2.
Post. 668.
Co. Lit. 89. a.
Co. 4. 84. a.
Hob. 18.

Barrons versus Ball in the Exchequer Chamber.

Action for these words, Thou art a murderer, for thou art the fellow that didst kill Mr. Sydnam's man. And he doth not shew that any of his Servants was slain, nec innuendo any that was slain: Upon Not guilty pleaded, it was found for the Plaintiff, and adjudged for the Plaintiff in the Kings Bench, and Error thereof brought in the Exchequer Chamber, and for that cause reversed.

(10)
Ante 184.
Post. 343. 423?

3 Cr. 569.

Ratcliff versus Michael in the Exchequer Chamber.

Action for words, Thou art as bad as thy wife when she stole my Cushion: And Traversers that any Cushion was stolen; And after Verdict for the Plaintiff, and Judgment given in the Kings Bench, it was reversed for this cause in the Exchequer Chamber, for it is not averred that there was any felony committed; and then it is not any slander.

(11)
3 Cr. 250.
3 Cr. 904.

King versus Bagge in the Exchequer Chamber.

Trin. 8 Jac. Rot. 13.

Error of a Judgment in the Kings Bench in Action for words Mr. J. D. was robbed of 40 l. and 100 marks worth of Plate; and Alice Bagge, (innuendo the Plaintiff) and T. S. had it, and for that they will be hanged: Upon not guilty pleaded, and Verdict and Judgment for the Plaintiff, it was now assigned for Error, that an Action lies not for these words; For he doth not say that she stole it, and it may be they came to it by lawful means: And although he saith, they will be hanged for it, those words by themselves will not maintain an Action, and they do not enforce the first words; wherefore the Judgment was reversed.

(12)
Ante 302.
3 Cr. 250.
Post. 536.
1 Cr. 572.
3 Cr. 904.
3 Cr. 569.

Wharton versus Sir Edward Musgrave, in the Exchequer Chamber.

Error in the Exchequer Chamber; the Error assigned, for that Debt was brought in Cumberland, and Judgment had by confession, and a Scire facias brought against his Executor, in Midd. and Judgment there for the Plaintiff, where the Scire facias ought to have been brought in Cumberland, where the original was brought, and not in Midd. although the Judgment was there by confession at West. For the Scire facias ought always to pursue the first action; wherefore the Judgment in the Scire facias was reversed.

(13)
Hob. 4.
Yelv. 218.

Co. 6.

Jordan *versus* Wikes.

(14)
1 Rol. 768.
Hob. 5.

Ante 261.

Post. 417.

Ejectione firmæ of a Lease of Edw. Brigman 23. Octob. 9 Jac. of a Messuage and Lands in Wheature Aston for five years : Upon Not guilty pleaded, it was given in evidence for the Plaintiff, that Edw. Bridgman claimed that Land in right of his wife, and made that Lease for trial of the Title: The Defendant shews that the Lessor was dead after the Indenture, and before the Action brought : So the Lease being made by him only without his Feme, is void and determinable by his death, and it cannot be supposed he doth adhuc tenere extra possessionem: And although he might be found guilty for the first Ejectment, yet he cannot be guilty against him, for withholding the possession after the death of the husband; And the Lessee hath no cause, as this case is, to have any Habere possessionem. But the Court held, that in regard the Feme had not entred after the death of her husband, the Lease is not determined nor void after the death of her husband, but voidable only.

Bartholmew *versus* Belfield, Trin. 11 Jac. Rot. 924.

(15)
1 Rol. 766.

Error brought by John Bartholmew, son and heir of Tho. Bartholmew against Hen. Belfield, of a Judgment given by Default in the Common Bench, Trin. 40 Eliz. in a Formedon in descender, against Tho. Bartholmew the father, for a Messuage and Lands in Sunninghill in the County of Berks: The Plaintiff assigns for Error the Default of the Warrant of Attorney who was for the Demandant in the Formedon; Henry Belfield ponit loco suo Dawly Attornatum suum, without putting his name of Baptism (which was Anthony) Vide 15 Eliz. Dy. 336.355. & 105. Which seems to be Error, not aided by any Statute, nor amendable: The Defendant in the Writ of Error pleads in Bar a Fine with four Proclamations; the first Proclamation 23. June, Trin. 44 Eliz. The second Proclamation 16. Novemb. Mich. 44 Eliz. The third Proclamation 28. January, Hill. 45 Eliz. The fourth Proclamation 13. Maij, Pasch. primo Jac. according to the Statute of 31 Eliz. Which Fine was levied to John Serle and his heirs, of the Messuage and the Land in question, to the use of him and his heirs, with warranty; And the time of the Engrossing the Fine was shewn in the Plea; And that by vertue thereof John Serle entred, and was seised of the said Messuage and Lands to the use of him and his heirs; And demands Judgment, whether the Plaintiff shall be received to bring a Writ of Error, or to assign Errors against this Fine with Proclamations: Whereupon the Plaintiff demurred: And two points were moved at the Bar by Dampfort for the Plaintiff; First, whether he who is only Tenant to the Writ, and not Tenant to the Land, as the Defen.

Defendant here appears to be, may plead this plea which goeth in Bar of Errors: And secondly, whether the Bar be good. And it was resolved by the Court upon solemn argument, That the Tenant to the suit may well plead this Plea. Vide 9 H. 6. 46. & 47. 47 Ed. 3. 7, 8. Sir Rich. Walgraves Case. Fitz. Nat. Br. fol. 107. K. Cok. 3. the Marques of Winchesters case. Secondly, that this fine, and five years passed without bringing a Writ of Error is a good Bar, (by the word Actions) within the second saving of the Statute of 4 H. 7. cap. 24. And Coke Chief Justice remembered Mandevils case to be so adjudged upon solemn argument in the Exchequer-Chamber 27 Eliz. That if one hath right to a Writ of Error, and suffer five years to pass without bringing that Writ, he shall be barred by that fine and five years passed; and so it was said to be adjudged 28 Eliz. in Barton and Harvies case, and Dampports case, 5 Eliz. Dy. 224. against the opinion in Zouches case, Plow. 373. Vide Coke 10. 49. b. Lampets case, and Co. 10. 98, & 99. Seymors case. 1 Rol. 766.

Termino

Termino Hillarii,

Anno undecimo JACOBI Regis in Banco Regis.

Marsh *versus* Brace.

(1)

DEbt upon a Lease for years, and demand Rent for two years and an half, ending at the Annunciation last past; The Defendant pleaded, that before any Rent due, he assigned his estate and interest to J. S. who payed the Rent to the Plaintiff for half a year due after the assignment, which he accepted from his hands: And it was thereupon demurred, because it is not alledged that he gave notice unto him that he was Assignee, and also because the contract continues betwixt the Lessor and Lessee during the Term, notwithstanding this Assignment. But all the Court resolved, that this assignment and acceptance of the Rent from the hands of the Assignee is notice in it self, and an agreement that he is his Tenant; and then he may not afterwards resort back to the Lessee; And the Bar is good to a common intent, and it shall not be intended but that he knew him to be his Tenant, and accepted him as his Tenant; unless the contrary be shewn: Wherefore it was adjudged for the Defendant, If other matters were not shewn, &c.

Post. 398. 523.
2 Jan. 1604.

Sir Christopher Heydon *versus* Godsalve.

(2)

ERROR of a Judgment given before Thomas Fleming Chief Justice, and Justice Doderidge in an Assise of Novel disseisin against the said Sir Christopher Heydon by Roger Godsalve of Lands in Baconsthorpe in the County of Norff. The Defendant confessed that he was tenant, and that the Plaintiff was seised in Fee, and could not deny but that he disseised him; Upon which confession the Plaintiff released the damages, and had Judgment to recover seisin per visum recognitorum: And thereupon a Writ of Error was brought; and the Error assigned, because the Judgment was, Quod recuperet seisinam per visum recognitorum, whereas the Assise was never taken, but Judgment given upon confession: And upon this Error assigned, it was demurred; And after argument at the Bar, resolved by the Court to be no Error; For although the Assise was not taken, yet the Jurors had the view by intendment given unto them before the Assises, by the Sheriff, as he is commanded, and they are called Recognitors, and so are intituled Nomina Recognitorum; and the Subscription is Summonitio Recognitorum; And although the

the Assise is awarded upon the plea in Bar, and the seisin and disseisin is confessed in right of the damages, which is but an Enquest of office, yet they be called Recognitores; and although they never passed on the Assise, yet Judgment ought to be, Quod recuperet visum per recognitores; For otherwise, if he should be redisseised, he could not have a Writ of Redisseisin; for that ought always to be by the Jurors of the first Assise, by whom the view of the seisin was given: And if all the Recognitors of the Assise be dead, so as there be not two of them alive, who with others may inquire of the redisseisin, the Writ of Redisseisin fails, as Nat. Br. 189. h. 8 Hen. 8. ^{2 Inst. 84. W. 2, cap. 26.} 23 Ass. Pl. 7. 33 Ed. 3. Redisseisin 7. 40 Ass. 13. Wherefore upon these reasons, and upon view of a president ^{4 Jac.} of such a Judgment given before Popham in an Assise, where the disseisin was confessed, and search made, and the president found accordingly, It was held by them all, that the Judgment was good; and if no president had been shewn, yet it stands with reason that such a Judgment should be good; For otherwise, by the tenants Act, there never could be a Redisseisin: Wherefore the Judgment was affirmed.

Wats Case.

Prohibition was prayed to the High-Commission Court, for one Wats, Parson of S. (who was there deprived for incontinency, and another presented to his living, and he thereupon procuring a pardon to be restored to his benefice, was afterwards sued and proceeded against for costs of suit) to stop their proceedings (he having obtained the pardon, before the sentence was given.) And it was allowed per Curiam; For though another be Plaintiff in suits in the Courts of Star-Chamber or High-Commission, yet they be the Kings Suits, and he may pardon them: And if the Pardon comes before any Sentence given, they shall not afterwards give any costs, as Co. 5. fol. 51. Halls Case. ⁽³⁾ ^{1 Cr. 47. 68.}

Heath *versus* Rydley.

In an Action of Debt, at the Common Law; Judgment being against the Defendant, and day given to move in arrest thereof, he in the interim preferred his Bill in Chancery, and obtained an Injunction to stay Judgment and Execution: But notwithstanding, the Court granted both; For by the Statutes of 27 Ed. 3. cap. 1. & 4 Hen. 4. cap. 23. After Judgment given, (be it in plea real or personal) the party ought to be quiet, and to submit thereto; For a Judgment being once given in curia Domini Regis, ought not to be reversed, nor avoided, but by Error, or Attaint: And in the same term upon a Prohibition to stay proceedings in the Court of Requests, it was delivered for a general Maxim in Law, That if any Court of equity doth intermeddle with any matters ⁽⁴⁾ ^{Post. 344.} ^{1 Cr. 596.} ^{2 Cr. 646. 7.} ^{3 Inst. 123.} ^{4 Inst. 97.} ^{Hob. 15.}

matters properly triable at the Common Law, or which concern Freehold, they are to be prohibited; For neither Writ of Error, or Attaint can be brought to reverse the decrees made in those Courts. Otherwise it is upon trials at the Common Law; For all matters are there decided either by a Jury of twelve men, against whom (if they err in their Verdict) an Attaint lieth; or by the Judges, where if they err in their Judgment, the party grieved may bring his Writ of Error.

Hetley *versus* Sir John Boyer, Sir Anthony Mildmay, and others.

(5)

The Defendants (being Commissioners of Sewers in the County of Northampton; Upon the Statute of 23 H.8.c.5.) assessed a fine upon the Village of D. and appointed it to be levied by J. S. and another, upon the Cattel of Hetley, and they to sell them for the fine; which accordingly was done: Whereupon Hetley brought his Action in this Court, and had Judgment against them; For which he was called before the said Commissioners, who strongly importuned him to release the said Action, but he refusing, they committed him to Peterborough Goal: Their Warrant to the Gaoler being, To take the body of William Hetley, and him there to keep without Bail and mainprise, till he should hear further from them of some order to be taken for his delivery: Whereupon the Court was now moved for his discharge, and for an Attachment against the Commissioners: Which being awarded, returnable the Term following, and some of them then present in Court, they were fined and committed; For it was held, that the Warrant by them made was in direct opposition to the Authority and Judgment of this Court; and that the Commissioners of Sewers cannot tax a whole Township, but it ought to be done severally, and proportionably to every Inhabitant to himself, as it was adjudged in Cokes 5. Rep. Rooks Case 100 a. And that the words of the Statute of 23 Hen. 8. cap. 5. Left to their discretion, ought to be sana discretio, which is, discernere per Legem quid sit justum; But herein appeared an apparant malice, to impose a fine upon a township, and one man therein to be only punished. But Sir Anthony Mildmay, (being chief of those Commissioners) not then appearing in Court, according to warning, in Termino Pasch. 12 Jac. An Endicement for a Premunire was drawn against him upon the Statute of 27 Ed. 3. cap. 1. for that his illegal acting as a Commissioner; who being thereupon fined for that offence, obtained the Kings pardon, and in Mich. Term following, moved for an allowance thereof; which being read and viewed by the Court, the words thereof were, Omnes & singulas offensiones, transgressiones & contemptus. Coke Chief Justice thereupon made a question, whether by this pardon the Judgment in the Præmunire was released; That Judgment being, It shall be done unto him as with the Kings Enemies: But afterwards the Court allowed of his pardon,

Termino

Co. 10. 143. a.

Co. 10. 140. a.
Co. Lit. 227. b.

3 Inst. 125.

Co. Lit. 129.
130. a.

Termino Paschæ,

Anno duodecimo JACOBI Regis in Banco Regis.

Child *versus* Durrant, Hill. 11 Jac. Rot. 155.

AUdita querela; for that John Durrant, Pasch. 10 Jac. brought Trespass in the Kings Bench against Child, and damages were assessed to 14 l. and costs to 5 l. ⁽¹⁾ 2 Rol. 404. Yelv. 217. 10 s. and Judgment there given for the damages and costs. And that afterwards in Pasch. 11 Jac. Child brought a Writ of Error; and Judgment was affirmed in the Exchequer-Chamber, and 5 l. 10 s. there assessed for costs, for delaying the Execution: And that Durrant did not enter the first Judgment, but mean between the first Judgment, and the Judgment in the Writ of Error he released to Child, all Executions and Demands; yet notwithstanding this Release he had sued Execution as well for the 14 l. damages, and 5 l. 10 s. for costs upon the first Judgment, as for the costs upon the Writ of Error; wherefore he prayed relief. Durrant, who was Plaintiff in the Action of Trespass, takes Issue upon the Release, and found against him for Child; and after Verdict Durrant moved in arrest of Judgment, That this Release shall not help Child the Plaintiff in the Audita querela, because, being before the Judgment affirmed, and not pleaded; that Execution is now upon the the last Judgment; and so he shall not have benefit of this Release: Sed non allocatur; for he had no time to plead it: Also this second Judgment is only for the costs increased, and the Execution for the first costs and damages is upon the first Judgment, and not upon the second: Wherefore this Release is a Bar unto it: And although the Execution be entire, yet that is no cause of discharging the whole, but only of the first damages and costs, but not quoad the costs assessed upon the Judgment affirmed: Wherefore it was adjudged that he should be discharged quoad them, but not quoad the second costs: And he was restored accordingly. 1 Cr. 47. Post. 401.

Marsham *versus* Jolles, Mich. 11 Jac. Rot. 2073.

(2)
Hob. 20.
2 Rol. 147.
Ant. 190, 290,
309.

ERror of a Judgment in the Common Bench, in Debt upon an Obligation of sixty pounds; *Oyer* being demanded, the Obligation was entred in hæc verba, &c. pro sexaginta, sexinginta; and upon this variance, it was demurred in Law, and Judgment given, and Writ of Error brought thereupon, and this point assigned for Error and without argument, the Judgment was affirmed. For it was held, that the Obligation was good; and the words all one in intendment.

Crawley *versus* Lidgeat, Trin. 11 Jac. Rot. 822.

(3)
1 Rol. 896.

Co. 6. 45. a.

Moor 762.
Ant. 74.

Hob. 59.
Ant. 74. 143.
Post. 532, 549.
1 Cr. 75.
3 Cr. 850.
Ant. 143.

Hob. 2. 59.
Dyer 299. b
Moor 341.
3 Cr. 160.
33 H. 8. c. 5.

Moor 341.

AUdita querela; for that whereas the said Thomas Crawley, and one John Bate, were obliged jointly and severally to the Defendant in 150 l. And the Defendant in Mich. 7 Jac. recovered in the said Common Bench against the said John Bate his said Debt, and 3 l. 12 s. for costs, and the same Term brought another Action in the Kings Bench against the now Plaintiff, and recovered the said Debt, and 7 l. 12 s. for costs; and that the Defendant 16 Octob. 10 Jac. sued an Elegit against John Bate: Whereupon was returned, that he had goods to the value of 10 l. which were delivered in Extent, and Lands to the value of 20 l. which he held for the life of Alice Shelton by Lease, the moiety whereof he had in Extent; and notwithstanding he had taken that in satisfaction of his Debt, yet he had procured a Capias ad satisfaciendum for the same Debt against the now Plaintiff, and had taken him in Execution; for which he prayed remedy: And upon this Declaration it was demurred, that these two several Judgments are upon one same Bond, and upon one same cause, and for one and the same Debt, of which he ought to have but one Execution with satisfaction; But until satisfaction he may have Execution against them severally, which is the Reason in 4 Hen. 7. 8. & 29 Hen. 8 Execut. 132. that although the one be taken in Execution by Capias, he may have a Capias against the other, because it is not any satisfaction; for the body is but a pledg for the Debt, and no satisfaction: But when he hath taken forth an Elegit, which is returned served, and Lands delivered in Extent, that is as satisfaction, and is an end of the Suit, and the Law accounts it as a full satisfaction; for he is to hold the Land until he be fully satisfied, and shall never afterward have any other Remedy; which is the Reason that at the Common Law, after the Elegit is returned, served, if the Land be afterward evicted, he never shall have a re-extent or any other Remedy. For the Law reputes him as satisfied: And so by the Statute of 32 Hen. 8. if part be extended and not all, he shall not have a re-extent, but he shall

shall hold the residue until he be satisfied; and the Law will not make any fractions: But being satisfied for part, by the Land, he shall not resort after to another Execution. And Coke said, the reasons yielded in the books be, that after an Elegit taken, he shall not have a Capias; for it is intended Quod elegit sibi executionem, when it appears so upon the record (but that is never done (if he be a good Clerk who doth it) until it be returned) and the taking of the Land in extent for the Debt, is in Judgment of Law, as if he had taken a Lease for years in satisfaction of the Debt: And if he had taken satisfaction of the one, he never should take Execution against the other, and that is his full satisfaction in Law; that although this Execution is afterward reversed, yet he shall not have any other Execution: Whereupon all the Justices delibered their opinions seriatim, that the Execution was not well taken: Wherefore it was awarded that he should be discharged. Vid. Co. lib. 5. fol. 87. 9 Ed. 4. 3 l. 50 Ed. 3. 4. & 5. 34. Hen. 6. 20. 21 Hen. 7. 19.

Moor. 545, 598

Hob. 57.

Hob. 2.

Co. Litt. 289.

Post. 694.

Hob. 2.

Hutton *versus* Bech, Mich. 11 Jac. Rot. 66.

Action for words; whereas he was Constable and Churchwarden of Aunltie in the County of Lincoln; and by reason of those Offices expended divers sums for the use of the Inhabitants of the same Village, and behaved himself truly in the Execution of those Offices, that the Defendant spake these words of him, Thou hast beguiled and deceived the town (innuendo the Inhabitants of the Village of Aunltie) upon thy accounts of 4 l. And it is no marvel thou growest Rich, when thou deceivest the Town: The Defendant pleaded Not guilty, and found against him; and it was moved that these words be not actionable, for they be too general: And of that opinion was the whole Court; for to say that he is a Cozener, and cozened such of such money, is not actionable, as it hath been adjudged; for it is uncertain what thing Cozening is: And although it was here objected, that these words were spoken of an Officer sworn, and toucheth him in point of his Office with perjury, it was held not to be material; for this Action is not in point of Office, nor is it an apparent affirmative that he is perjured: Wherefore it was adjudged for the Defendant.

(4)

1 Cr. 417, 516.
Post. 619.

Freeman *versus* Sheen.

Debt upon an Obligation of 100 l. The Condition was to perform the arbitrement of 1. S. The Defendant pleaded that he made an arbitrement, wherein was recited, That whereas there was a Suit in Chancery by Sheen the Defendant against Freeman, for such a cause, &c. That that Suit should

(5)

2 Rol. 432.

¶ x 2

cease,

cease, and that the said Freeman should stand acquitted de qualibet materia in ead. contenta; and avers, that he did not any further prosecute the said Suite; and that the Plaintiff always afterwards stetit inde quietus of every matter in the Bill, and pleads performance of all other the said matters; the Plaintiff shews, that before the submission the said Defendant exhibited quandam billam in the Chancery against him, and sets it down verbatim; and shews further, that after the arbitrement, he exhibited in Chancery quandam aliam billam, &c. and shews it verbatim, and avers that they were both for one same cause, and the same matter comprised in the last bill as was in the former; and so he was not acquitted, &c. And hereupon the Defendant demurred in Law, and it was moved, that the arbitrement being, that the Plaintiff staret acquietatus pro qualibet materia in prædicta billa, &c. It is not sufficient to say, quod stetit quietus, but he ought to shew that he was discharged thereof in fact, and how; as 22 Ed. 4. 21. & 18 Ed. 3. Bar. 247. 8 H. 7. 6. And of that opinion was Doderidge upon the first motion: But being afterwards again moved, Coke and all the other Justices held, that the Plea is good enough, notwithstanding that exception; for there is difference where one is obliged to acquit another of such a Debt or such a Suit, it is not sufficient to save him harmless; but he ought to procure his actual discharge, as the books he before cited: But the arbitrement being, that he staret acquietatus, that is no more but that by that arbitrement he shall be acquitted; which is sufficient: For where arbitrators make an award, that the one should be quit against the other, that is a good Bar in an Action brought by any of them, 20 Hen. 6. 18. 22 Hen. 6. 39. Secondly, it was objected, that this Replication was not good, because it is not shewn that any Sub poena was sued forth upon the Bill, nor that the Defendant answered thereto, nor what became of it: And this was held to be a material Exception; for otherwise there is no damnification or cause of fear, 18 Ed. 4. 27. Coke 5. 24 Broughtons Case. Thirdly, it was moved that the Replication was not good; for he saith, Quod exhibuit quandam billam, which is another than is intended in the arbitrement: Wherefore it was adjudged for the Defendant.

Ant. 165.

1 Rol. 432.

Vale versus Field.

(6)
2 Rol. 620.

Ejectione firmæ of a Lease of Robert Arden; and declares of a Lease made at Cardworth, of Lands in parochia de Cardeworth prædict. The Defendant pleaded Not guilty, and being found against him, it was moved in arrest of Judgment, that the Venue was awarded de parochia de Cardeworth, where it ought to have been de villa de Cardeworth; for Parochia de Cardeworth prædict. is not the Village mentioned before. But

But all the Court held it was good enough, for (prædicta) made them all one; and the Court shall not intend that the Parish extend into other Vills than Cardeworth: And although a Parish may extend into more Vills, yet it shall not be so intended, especially when it is said, Parochia de Cardeworth prædicta. And therefore the Ven. fac. awarded de Cardeworth, or de Parochia de Cardeworth is well enough: Wherefore by the opinion of the whole Court it was adjudged for the Plaintiff. Vid. 4 Ed. 4. 38. 22 Ed. 4. 2.

Post. 676.
Hob. 6.
Ant. 263.

3 Cr. 538.]

SIt Christopher Heyden *versus* Roger Godsalve and others. A Writ of Error was brought, returnable in Parliament, of a Judgment given in the Kings Bench in a Writ of Error in affirmation of a Judgment in an Assise, Quod vide ante fol. 334. And this Writ was granted upon an especial Petition unto the King: And now this Term it was prayed that Execution might be granted, notwithstanding this Writ of Error, because at another time he had a Superedeas upon the first Writ of Error, whereby the Plaintiff was delayed in the Execution of his Judgment in the Assise; and therefore he ought not to be again delayed by a new Writ of Error. Vid. 5. H. 7. 22. 6 H. 7. Secondly, this Writ of Error is to reverse a Judgment upon a Judgment, and the first Judgment being affirmed by the second Judgment, is more than a single Judgment, and it shall be intended true; wherefore the Execution shall not be stayed, no more than in an Attaint. Also divers Exceptions were taken to this Writ of Error, whereby the Record ought not to be certified thereupon. (1.) Because that the Writ was, In recordo & processu Assise novæ disseisinæ quæ fuit inter ipsos Rogerum, &c. & præfatum Christopherum summonit. & capt. coram dilect. & fidel. nost. nuper Thom. Fleming nuper capital. Judiciar. nost. ad Placita, & Joh. Doderidge milite uno Justiciar. nost. ad Placita coram nobis tenend. assignato Justiciar. nost. ad Assisas in Comit. Norf. nuper assignat, &c. (1.) Exception, Because he doth not shew who was Plaintiff or who was Defendant in the Writ of Error, nor in the Assise: Sed non allocatur; for the Presidents are both ways, sometimes to name the Plaintiff and Defendant, and sometimes not. Secondly, because he doth not shew whether the Assise were by Writ or without Writ by custom. Thirdly, because he doth not shew the places where the Assises were held. Fourthly, because Thomas Fleming was named Capitalis Justiciarius ad Placita; and he doth not say, Coram nobis tenend. assignat. Fifthly, for that the Writ is, Recordum nobis sub Sigillo vestro in præsens Parlamentum mittatis; whereas it ought not to be certified under his Seal, but only the Record brought by his hand, and the transcript left in Parliament, and the Record it self ought to be carried back by the Chief Justice. Vid. Dy. 375. 22 Ed. 3. Error 8. 8 Hen. 8. Error 81.

9 H. 5. 13:

(7.)
2 Rol. 492.
Ant. 335.
Moor 834.

Post. 397.

Post. 534.
2 Rol. 492.

R. 2.

9 H. 5. 13. 1 H. 7. 19. And afterward all the Justices delivered their several opinions concerning these Exceptions. And they all, besides Doderidge conceived the Writ ill upon the fourth Exception, for there was no such Record before Sir Tho. Fleming, capital. Justiciar. ad Placita, the words *Coram nobis tenend. assignat.* being omitted, and the addition of them after these words, viz. (Joan. Doderidge milite uno Justiciariorum nostrorum) cannot refer them to the first. Vid. Dy. 173. And for the suing execution, they all besides Coke Chief Justice, held, that the Writ of Error it self is a Superseas in it self; for although there were a Superseas before, that was upon another Judgment; and this Writ of Error is upon another Judgment, and is in debate whether it be Error or no; and until it be determined, they may not proceed to Execution: And they all held that a Writ of Error in Parliament is by the dissolution of the Parliament determined.

Mallory *versus* Lane in the Exchequer-Chamber.

(8)
1 Rol. 20.
Hob. 4.

ERROR in the Exchequer-Chamber of a Judgment given in the Kings Bench in an Assumpsit, for that whereas the Father of the Defendant Mallory being indebted unto him, the said Lane, in 200 l. did deliver to the said Lane two Statutes of Sir John Wentworth of 400 l. and promised to make unto him an assignment and Letter of Attorney to recover and receive the said Debts upon the said Statutes, and died before any assignment: The Defendant, pretended himself to be Executor unto his Father, requested the Plaintiff Lane to deliver unto him the said Statutes; and in consideration that he would deliver them, promised to pay unto him 200 l. at such a day; and that upon his promise he delivered unto him the Statutes, and that he had not payed, &c. Upon this, Mallory the Defendant in the Kings Bench pleaded Non assumpsit; and found against him; and Judgment accordingly: And now it was assigned for Error, That it was not a sufficient consideration to ground an Action; for the Plaintiff hath no interest in the Statute, and the re-delivery of them unto the Defendant, is no more than a delivery of such things as belong unto him if he be Executor. But it is here alledged, that the Defendant Mallory pretending himself to be Executor; so he doth not shew that he is Executor, and then he hath no benefit by the delivery of them unto him: Sed non allocatur; for all the Justices and Barons held it to be a good consideration; for when Lane had the Statutes delivered unto him lawfully, although he had no assignment of them, so as he might sue them, yet he might retain them: And therefore this delivery of them unto the Defendant Mallory without suit, is a sufficient consideration: also they held, although the Defendant Mallory is not shewn to be Executor, but pre-

3 Cr. 357.
R. 2.
3 Cr. 194.
Hob. 5.

tend himself to be Executor; yet obtaining the Statutes into his hands upon this consideration, it is a sufficient ground for the Action against him: Wherefore the Judgment was affirmed. 3 Cr. 821.

Jacob versus Mills.

ERror of a Judgment in the Kings Bench, in an Action for words spoken at two several times: The Defendant pleaded ⁽⁹⁾ Hob. 6. 268.
1 Rol. 77. 775. ed Not Guilty, and found against him, and Judgment for the Plaintiff; and several damages being found by the Jury, one entire Judgment was given for damages and costs: And now the Error assigned, That for these words first mentioned, viz. He hath poisoned J. S. (quendam J. S. adtunc defunctum innuendo) and he not averring that he was dead at the time of speaking the words (for adtunc refers to the time of the Declaration) the Action was not maintainable: And so was the opinion of all the Justices and Barons, that the Action lay not; and that the Judgment was erroneous: But whether it were reversible for the entire, or only quoad the Judgment for those words (the damages being severally assessed by the Jury, but entire costs and entire Judgment given) was the doubt: And they all conceived, that the Judgment shall be reversed only quoad the damages for the words, for which the Action lies not, and shall be affirmed quoad the costs and the residue; for all the costs are due, as well where part of the words are found, as where the residue is found: Ant. 331.
Ant. 215.
4 Boul. 117. Cook? Whereupon the Judgment was affirmed quoad part, and reversed quoad the residue. 1 Cr. 327.
Co. 10. 131. a.

Anonymus Trin. 10, Jac. Rot. 1153.

DEbt upon an Obligation: The Defendant after Issue de Durell. at the Nisi prius, relicta verificatione dicit quod ipse non potest dicere actionem, nec quin ipse fuit sui juris & scriptum prædictum fecit voluntarie. And thereupon Judgment entred, And the Error assigned, because the entry was, Quod non potest dicere (where it ought to have been deducere) which made all the sentence vicious and insensible, and is not amendable; and of that opinion was the whole Court: Wherefore it was reversed. (10)

Courtney versus Glanvil.

GLanvil (who was committed unto the Fleet the last day of Mich. Term 11 Jac. for non-performing of a decree in Chancery) upon an Habeas Corpus returned: The Case was informed to be such: Glanvil told to Courtney, being a young gentleman, a jewel, which he pretended to be of the value of 360 l. whereas in truth (11)

truth it was worth but 20 l. and three other Jewels to the value of 100 l. and for his security he took a Bond of 600 in the name of one Hampton, and procured an Action to be brought in the said Hamptons name, and the Action to be confessed, and Glanvil paid all the charges of both parties; and the confession was out of Court in the Vacation: Afterwards Courtney finding this deceit, that the Jewel was not worth above 20 l. which was delivered unto him at the rate 360 l. exhibited his Bill in Chancery for relief, and afterwards brought a Writ of Error to reverse this Judgment, and the Judgment was affirmed; afterwards upon an hearing in Chancery, this cause was decreed, That Glanvil should take again his Jewel and 100 l. and that he should procure the said Hampton to release and acknowledge satisfaction: And for not performing this decree he was imprisoned. And Coke Chief Justice said, That this decree and imprisonment, being after a Judgment at the Common Law was unlawful, and that this Court ought to relieve him; and for proof he cited a Judgment Pasch. 5. Ed. 4. Rot. 35. betwixt Cobb and Moor; where Cobb procured an Action of Debt to be brought against Moor; and the Action to be confessed by Attorney, and a Writ of Error to be brought thereupon, and the Judgment to be affirmed, and all this was done in the absence of Moor, who being beyond Sea; upon his return exhibited his Bill in Chancery, to be relieved concerning this practice, there being no Debt due: And it was resolved, that after a Judgment at the Common Law, he could not be relieved there, but was enforced to exhibit his Bill in Parliament. And there was a special Act made for his relief. He also cited another precedent Mich. 39 & 40 Eliz. betwixt Sir Moyle Finch and Throgmorton, an Action was brought, and upon special Verdict; The question being upon a Lease for years by the Queen, rendering rent, and for non-payment to be void: In Anno 3 Eliz. Sir Moyle Finch purchased the Reversion, and entered for non-payment of the Rent in 9 Eliz. And because it was resolved to be a limitation, and to be a Lease void without Office; and that the Patentee might avoid this Lease, and was adjudged accordingly; and this Judgment affirmed in a Writ of Error. Throgmorton afterwards exhibited a Bill in Chancery; complaining, that at the same time that the default of payment was, in 9 Eliz. he did send the Rent by his Servant, who was robbed thereof, which when he knew, he paid it immediately the day after, and that the Queen accepted thereof; and that he continued the payment until 30 Eliz. when the Queen sold it, and that the Queen sold it as a Reversion, and charged with this Lease; therefore it was against conscience, that the Patentee should avoid it. And to this Bill Sir Moyle Finch pleaded the proceedings at the Common Law, and demanded Judgment, if he might now proceed in a Court of

Ant. 335.

3 Inst. 123.

3 Inst. 124.

4 Inst. 36.

3 Cr. 221.

of Equity: And all the Judges of England were hereupon assembled, and these matters debated before them; and resolved by them all, that although the said Bill comprehended much matter of Equity, and there was very good cause he should have been relieved, if he had complained before the Judgment obtained at the Common Law, yet now having suffered a Judgment at the Common Law, although it were by way of defence, he comes too late to be relieved in a Court of Equity; and cannot now examine any pretence of Equity, after a Judgment at the Common Law. Wherefore he and all the Court held here, that the party ought to be bailed, and they let him to Bail until the next Term, and he was then discharged. Vid. 22 Ed. 4. 37.

Cramlington's Case.

Cramlington being Indicted for a Rescous, exception was taken thereto, because it wanted the words *vi & armis*, or *manu forti*; as also because the place where the Rescous was made was not certainly expressed. But the Court held, it was to be intended, that where the arrest was made, there also was the Rescous; and therefore certain enough, without the word *ibidem*: The Indictment also was good without the words *vi & armis*; for the word *Rescussit*, implies it to be done with force. (12)
Ant. 287.
Post. 473.

Selby *versus* Carrier.

Action for these words, Thou art a Bankrupt Knave: Upon Not guilty pleaded, and found for the Plaintiff, and a motion in arrest of Judgment, that the words were not actionable, it was held by the Court that the words were scandalous, and actionable being two Substantives: Otherwise it had been if the words had been Bankruptly-knave, or had been Adjectively spoken; and Judgment was given for the Plaintiff. (13)
1 Cr. 31.
3 Cr. 268.
Post. 583.

Penfon *versus* Castwright.

Prohibition was prayed to the Court of Requests, for that they there intermeddled, and would determine matters of Legacies. The Case was; One by his Will in writing devised a certain Legacy in money, and afterwards said to his Executor, I have by my will given such particular Legacies, I would have you to increase the same to such a sum. This by the Civil Law is termed *Commissum fidei*, and held a good Legacy; and if for this Legacy, there be any remedy to be had in the Spiritual Court, if the Court of Requests will inroach upon the Jurisdiction of other Courts, and so draw the matter ad aliud examen, (14)
3 Inst. 120.
P p men,

Post. 951.
Hob. 15. 17.
R. 12. 107.

men, whether this Court is not to correct it. And it was held by the whole Court, That if they of the Court of Requests ought not to hold Plea thereof, this Court (notwithstanding it self cannot hold Plea thereof) may well prohibit that, and other Courts from holding plea of such things. For this Court is to take cognisance of all other inferiour Courts, and to correct all Errors and Proceedings in them: And by Coke, if a Codicil be by word, they in the Spiritual Court are to compel them to add it unto the Will; and therefore there being an ordinary remedy to be had for this special kind of Legacy, the Court of Requests is not to hold any Plea of it. Vid. Stat. 4 H. 4. cap. 23.

Rowland Egerton *versus* Ed. Egerton.

(15)
2 Rol. 315.

1 Cr. 94. 115.
1 Cr. 166.

1 Cr. 396.

Prohibition was prayed to the Prerogative Court, to restrain their Proceedings there, in proving the Will of Sir John Egerton, who thereby had disposed of all his personal and real Estate, and disinherited his right Heir, and gave nothing to any of his Grandchildren: The ground whereupon this motion was made, to have a Prohibition for the whole Will, was, in regard it was intended to have a Tryal at Law, whether it were a Will or not; and if they should be suffered to proceed, and prove the Will there, and to allow it there, for his Personal Estate, it would then be a very great evidence to induce the Jury upon a Tryal to pass for the Will; therefore to prevent the prejudice to the Tryal, which afterward was to be had in this Court, a Prohibition was prayed for the whole. It was also further shewed, That Sir John Egertons daughters (during that Suit for the Probate of the Will) had taken Letters of Administration out of the Prerogative Court for the Personal Estate; by which act they had there in a manner disallowed of the Will. And this the Court conceived to be very strange; and granted a Prohibition for the whole, both for the Land and Goods; and that after the Tryal here had, the same to be remanded unto them, as to the goods; and this difference was then taken, and agreed for Law by the whole Court, That where a Will doth contain in it lands and goods, the Court shall not grant a Prohibition for the whole, in the generality: But if in such a special case it be alledged, That the party who made the Will, was then *de non sane memorie*, a Prohibition shall there be granted for the whole: But such a Prohibition is not to be granted in all cases, where a Will contains in it a disposing both of Lands and Goods; for then it would tend to hinder all the Proceedings in the Ecclesiastical Court; which is not to be granted but in special Cases only; for the Law allows of a Probate there; because before the Will be proved, an Executor cannot bring any Action. Vid. Co. 6. fol. 23. b.

Fox *versus* Prickwood.

Prohibition was prayed to the Lord President and Council (15)
 of the Marches of Wales: Where the Case was, J. S. be-
 ing seised of the Land in Fee, makes a Lease for life, and after-
 wards levies a Fine of all his Lands with an Indenture to lead
 the uses of the Fine, which was to the use of J. D. for 15 years,
 and afterwards to the use of himself for life, with a power (by a
 Proviso therein) for himself to make Leases for 21 years, or
 three Lives in possession: This Lease (as touching this power)
 being questioned before the Council of the Marches of Wales, by
 a Bill there preferred, to have a stay of the Execution of the power
 to make Leases during the 15 years (he having executed the
 same by making a Lease during the continuance of the 15 years)
 Whereupon a Prohibition was prayed, and granted by the Court:
 for they all agreed, that this term of 15 years is presently subject
 unto the power, by the Proviso of him in Remainder, to make
 Leases for years; and that this power doth issue out of the whole
 Estate; and that the first Lessee shall have the Rent reserved du-
 ring the 15 years limited unto him: And so those being matters
 determinable at the Common Law, the Court of Marches ought
 not to intermeddle therewith. Ann. 319.

Y y 2

Termino

Termino Trinitatis,

Anno duodecimo JACOBI Regis in Banco Regis.

Oldfield *versus* Inhabitants, Hundreds de VVhitherly,
in Comit. Cant.

(1)

Action upon the Statute of Winton supposing that he was robbed of 80 l. in money, and of a Cloke and divers other things; and the Hue and Cry was made, &c. And that the Inhabitants had not answered him, &c. Upon Not guilty pleaded, it was found, Quod quoad captionem, asportationem & spoliationem infra script. 80 l. that the Defendants were guilty; and assesses damages to 90 l. Et quoad residuum infra script. Not guilty: And Judgment for the Plaintiff, for so much as was found for him; and that the Defendants sinit in misericordia. Et quoad residuum quod querens nil capiat per Breve, & sit in misericordia: And Error being brought, was assigned; because the Verdict was ill given: for the Hundred cannot be guilty de captione, &c. But they be to be found guilty for not taking the Thieves, or not answering the said money, &c. Sed non allocatur; for they may be found guilty according to the Declaration, for so much as was proved, whereof the Plaintiff was robbed: And although the Plaintiff had put into the declaration divers things, of which peradventure he could not prove that he was robbed: yet for so much as he proved, it is well enough: And the finding that they are guilty of the Caption, &c. is as much as to say, that the Plaintiff was robbed of so much, and that they had not made him amends. Secondly, for that the Judgment ought to have been against the Defendants Quod capiantur, because the Action supposeth, that they did it in contempt, &c. Sed non allocatur; for that is only in a *Male fessance*, but not in a *Non fessance*, and therefore the Judgment shall be in misericordia. And the Plaintiff is well amerced for his false Prosecution: Wherefore the Judgment was affirmed.

Post. 631.
Ant. 224.

Jeffery Cobb *versus* Sir John Heydon.

(2)
Co. 11. 5, 6.

Error of a Judgment in the Common Bench in trespass of assault and battery against the said Jeffery Cobb, Thomas Walpole, Froxmere Cocket, and four others, where the then Plaintiff declared against them severally with a simul cum against the others; in which Actions Froxmere Cocket pleaded *De son assault Demesne*, and the Issue found against him, and damages assessed to 200 l. Tho. Walpole pleaded Not guilty, and found against him

him by another Jury to 50 l. and Judgment given against him, and Costs assessed severally to 25 l. Afterwards Judgment was given against Jeffery Cobb upon a Non sum informat. and a Writ of Inquiry of Damages awarded: And the return being Vicecomes non misit Breve, the said Judgment was entered; That it appeared to the Court, that in an Action for this Battery Damages were found by Verdict against another of the Defendants to 200 l. that the Plaintiff should recover against the said Cobb for Damages 200 l. and 25 l. for Costs: Whereupon Error was brought, because the Damages being found against one, ought not to conclude the other Defendants; especially the Writ of Enquiry of Damages being awarded ought to be pursued. And after divers motions in the Common Bench, where the said Judgment was given, and specially entered by direction of Court, it was here affirmed: And Coke Chief Justice delivered the reasons thereof; because the Writ is entire, and the Defendants are all charged with one Battery, although the declarations are several; and the declarations being with a Simulcum, &c. shews that they are joynt Trespassers, and therefore the damages given against the one shall serve and may be taken against the other: And if the damages be too great, any of the Defendants may have an Attaint although he be not the same party against whom the Verdict was found. Vid. 44 Ed. 3. 7. 26 H. 6. Enquest 16.

Ant. 118.
1 Cr. 243.
Post. 335.

Co. 11. s. b.
Hob. 66.

Termo

Termino Michaelis,

Anno duodecimo JACOBI Regis in Banco Regis.

- (1) **M**emorandum, That this Term these were made Serjeants, viz. George Wilde, and William Towse of the Inner Temple; Francis Moor and Francis Harvey of the Middle Temple; Henry Finch, Thomas Chamberlain and Thomas Athoe of Greys Inn; Leonard Bawtry, John Moor, John Chibon and Thomas Richardson of Lincolns Inne.

Goldsmith *versus* the Lady Plat, Executrix of Sir Hugh Platt.

- (2) **T**he Defendant pleaded plene administravit; and found against her, and Judgment accordingly; and now she brings Writ of Error: And it was moved, that she should not have a Superfedeas to stay the Execution without special Sureties to pay the Condemnation, if the Judgment should be affirmed. Upon the Statute of 3 Jac. cap. 8. which is general, That in all Actions of Debt upon a Bill or Obligation recovered, &c. Execution should not be stayed, &c. But the Court resolved, that this Case was out of the Statute; for although it be general, yet it is to be intended in such Cases where it is against the party himself, upon his Obligation, or in case where the Judgment is general against the Executors; but where the Judgment is special, that Execution shall be of the goods of the Testator, and damages only de bonis propriis; it is not reasonable, (nor the intent of the Law it should be otherwise) that the party should be enforced to find Sureties to pay the entire Condemnation with his own goods; and according to this difference, Coke said it had been ruled in the Common Bench when he was there: And Manthe Secondary said, that the Presidents of this Court, ever since the Statute made, were, that a Superfedeas had been allowed upon a Writ of Error brought by the Executor or Administrator.

Worts *versus* Clyfton.

- (3) **P**rohibition, by the Plaintiff in the Spiritual Court to stay his own Suit; for that he suing for Tythes in the County of Norwich, by vertue of a Lease made by the Vicar of Tostes for three years; the Defendant claimed to be discharged of the Tythes by a former Lease and Composition by Deed: And the Court held, that the Plaintiff himself might have a Prohibition to stay the Suit;

suit; for they be not to meddle with the Cryal of Leases or real Contracts, although they have jurisdiction of the Original Cause, Ant. 270. (viz. for Tythes) for the Lease is in the reality, and it is not merely accidental: Et non refert, although the Plaintiff in the Spiritual Court brings this Prohibition to stay his own Suit: for if this Court hath knowledge by any means that the Spi- Ant. 345. ritual Court meddles with temporal Cryals, they ought to grant a Prohibition. Vid. 1 R. 3. 4.

Powle *versus* Godfrey, Pasch. 10 Jac. Rot. 628.

Action upon the Case; for that Sir Daniel Dun Official in the Court of Audience, in a Case of Appeal betwixt the said Powle and one Robert Coleman, had remanded the cause, and condemned the Plaintiff in 4 l. 10 s. for Costs legitime assessed, and had monished it to be paid at Candlemas following; and upon the 21 Novemb. 1612. had awarded Process of Monition to warn him to pay it upon the said Candlemas day upon pain of Excommunication, which upon the tenth of Decemb. 10 Jac. was delivered unto the Defendant being an Officer of the foresaid Court to execute; and that the Defendant upon the twelfth of Feb. 10. Jac. falsley returned before Doctor Masters Surrogate of the Official, That he admonished him upon the 17 Decemb. 1612. whereas he never was warned; whereupon he was pronounced Excommunicate, whereby he was disabled to sue: And therefore brought this Action. The Defendant pleaded, that he monished him the 17 Septemb. 1610. and so mistakes both the month and year: And it was thereupon demurred, and now the Defendant shewed that an Action upon the Case lieth nor: Because this being a Spiritual Process, a Court Temporal cannot punish the falshood in the Execution thereof: But all the Court held, it was well enough; for he is thereby to have temporal loss, (viz. to be thereby disabled to prosecute temporal suits) and put to much expences, and therefore the Action lies. Post. 356. Moor. 835. Secondly, it was objected, that the Declaration was not good, because it was not shewn in what cause the Suit of Appeal was, so as the Court might know whether they have jurisdiction thereof; for it may be in a cause whereof they have not any jurisdiction, and then it is Coram non Judge; and so there cannot be any loss by reason thereof. Thirdly, it was objected, that it doth not appear, that Doctor Masters (before whom the monition was returned, and who awarded the Excommunication) had Authority: But all the Court held, that notwithstanding these Exceptions, the Declaration was good; for these Spiritual jurisdictions and proceedings need not be shewn at large, especially as this case is: For it is but an Inducement to the Action, the wrong and false return being the ground thereof; and particularly shewn, that the Caration of the costs and sentence were 1 Cr. 291. 1 Inst. 303. a. 1 Ant. 46.

were lawful, the particular proceeding need not to be expressed : wherefore it was adjudged for the Plaintiff.

Maxfields Case, Pasch. 11 Jac. Rot. 47.

(5)
St. 3 Jac. c. 5.

Ant. 278.

Peter Maxfield was indicted, That he, being a Convicted Re-cusant, departed above five miles from his abode in Walswood in the County of Stafford, against the Statute, &c. The Defendant pleaded, that he informed Ralph Snead, Walter Bagnal, and two other Justices of the Peace of the County of Stafford, (the said Walter Bagnal being a Deputy-Lieutenant there) that he had urgent occasions to go to London about business concerning his Estate, and made Oath before them that it was true : Whereupon they by writing under their Seals gave licence unto him to go to London, or to other places, as his business required, for six months ; by vertue whereof he went, and so justifies : And it was thereupon demurred, 1. because the Statute of 3 Jac. is, That four Justices of Peace with the assent of a Lieutenant in writing, or one of the Deputy-Lieutenants of the said County, in writing, may give Licence ; for it ought to be by four Justices besides the Deputy-Lieutenant : And all the Court were of that opinion ; for the Statute appointing precisely the number of the Justices of Peace with the assent of, &c. it ought to be exactly pursued ; and it is not sufficient that a Deputy-Lieutenant be one of the four : His assent also ought to be by it self without the other four. Secondly, the Licence is not good, because it is not pleaded to be under their Hands : And it is not sufficient to plead it to be under their Seals : Also the Licence ought to shew the particular cause of the Licence, and not in such general manner for urgent causes : Wherefore Rule was given, That if cause were not shewn, Judgment should be entered for the King.

Stain *versus* Wild, Mich. 12 Jac. Rot. 155. Norff.

(6)

Debt upon an Obligation of 20 l. dated 29 Jul. 10 Jac. Conditioned for the performance of the Arbitrement of John Havers and John Baylie of all Suits, Controversies and Demands between them : So as the same award of and upon the premises be made ready to be delivered to the said parties under their hands and seals before the feast of S. Bartholemew, &c. The Defendant pleaded, Quod nullum fecerunt arbitrium : The Plaintiff shews, that they accepto onere arbitrandi de & sup. præmis. postea scil. 8 Aug. ann. præd. made their arbitrement under their hands and seals, de & super præmis. modo & forma sequent. viz. That Tho. Stains should have and enjoy such a Horse which was in Controversie betwixt them, and that Wild the Defendant should pay unto him three pound, before Michaelmas towards his Charges ; and they

they should release the one to the other all matters whatsoever betwixt the said time and Saint Michael; and alledgeth the breach for non-payment of the said 3 l. Whereupon it was demurred, and it was moved, that it was not a good arbitrement, because the arbitrement being made upon the fifth of August, to release all Actions, extends to more than they had authority to arbitrate. And although it was said, being pleaded that they made the arbitrament de & super pramissis, it is intended, that there was not any cause of Action arising, betwixt the 29 July and the fifth of August, unless it were shewn on the other part: Sed non allocatur; for the words being general unless the Plaintiff helps it with an averment, that there were no more causes betwixt them, it is not good; and then the release appointed being void, there is nothing arbitrated for the Defendants benefit: Wherefore it was adjudged for the Defendant.

1 Cr. 217.
Post. 578.

3 Cr. 858.
Post. 448.
Post. 640, 664.
3 Cr. 861.
Moor 885.
Hob. 191.
Co. 10. 132. a

Wats versus King.

T Respals, for entring into his house and Close at Grendon: (7)
The Defendant justifies, for that a Cap. utlegat. was awarded against one Skelling, directed to the Sheriff of Somers. who made his Warrant to the Defendant to execute it: And because it was the common voice and fame, that Skelling was at the Plaintiffs House, he went in a foot-path through the said Close to the said House, and asked License of the Plaintiff to enter into his house to search for the said Skelling, and the Plaintiff licenced him: Whereupon he entred and searched for him, and not finding him, returned the same way, &c. The Plaintiff traverseth, that he did not enter by licence; and thereupon Issue joyned and found for the Plaintiff, and now moved in arrest of Judgment, First, that there is not any Replication for the close, nor any Issue joyned thereupon, and so all is discontinued. But Coke and all the other Justices held, that Judgment shall be given for that point which is found; and the discontinuance for the other is aided by the Statute. Secondly, it was moved, that it was a mistrial; for John Whitehead of Whitehead was returned, and John Whitehead of Whitehill was sworn: Sed non allocatur; for the alteration of the name of the Will is not material.

Hob. 187.
Ant. 304.

Ant. 244.

Sir Edward Musgrave versus Wharton, Administrator of Thomas Musgrave.

S Cire facias, upon a Judgment against the Intestate of 200 l. (8)
The Defendant pleaded plene administravit, and found against him; and it was now moved in arrest of Judgment. First, that the Writ of Ven. fac. was not good, because it is ad

Ant. 135.

Ant. 78.

Ant. 158.

1 Cr. 278.

Ant. 162.

1 Cr. 32.

Ant. 304.

Post. 396, 670.

ad triandum exitum inter *Ed. Musgrave* militem & *Thomam Wharton*, and he was not named Administrator of *Thom. Musgrave*; and there might be another Action and Tryal betwixt them in their proper right: Sed non allocatur; for it shall not be intended, unless it be alledged, that there be other Actions depending betwixt them. A second Exception was, because a Juroz upon the Ven. fac. was returned *Christopher Poulanby*, and so was named in the *Distringas*; but in the names of the Jurozs returned, it was *Pausanby*, who was sworn, so another name, then was returned: Sed non allocatur; for it is not another name, the difference being only in the Surname, and there is very small difference in the sound, especially in that Countrey, where the sounding is many times of A for O, or V for O: and therefore it is not any material variance. A third Exception, because the *Nisi prius* Roll whereupon the tryal was, is, that challenge being made to the Sheriff after Issue, and confessed, Ven. facias was awarded to the Coroner, but the Roll of *Nisi prius* was, that the Ven. fac. was awarded to the Sheriff, and the *Distringas* was awarded to the Sheriff, and thereupon the Tryal had, which cannot be, the Ven. fac. being awarded to the Coroners: But it was held, for that this Roll of the *Nisi prius* is a misprision, and ought to be warranted by the Record (although in truth the Roll was not entred at the time of the Record of *Nisi prius* made, and at the time of the Tryal, but is a Record after made) that it should be amended, and it was ordered to be amended, and Judgment given for the Plaintiff.

Ormelade versus Coke, Pasch. 12 Jac. Rot. 399.

(9)

DEbt for 10 l. for that the Plaintiff and Defendant 8 Aug. 10 Jac. submitted themselves to the arbitrement of *James Clerk* and *John Doughty*, of all Trespasses, Duties and Demands, and that they the same day and year arbitrated and ordered, de & super premissis, modo & forma sequente, viz. That the Defendant should pay to the Plaintiff in satisfaction of all Trespasses and Injuries done to the Plaintiff by the Defendant before the said day of submission, so much, &c. and for non-payment brings the Action; and upon this Declaration the Defendant demurred, pretending that the arbitrement was void: for it is arbitrated all on the one part, viz. that he shall give a Sum of money to the Plaintiff, and that the Plaintiff is not to do any thing to him. But after argument it was adjudged for the Plaintiff; for whereas it was awarded, That the Defendant should pay ten pound to the Plaintiff in satisfaction of all Trespasses made by the Defendant to the Plaintiff, the Defendant hath benefit thereby; for by the payment of the said Sum, he shall be quit against the Plaintiff of all Trespasses, and it is a good Bar against him: And although it were objected, that it appears not there was an end of all Trespasses and Demands between

Co. 8. 98. a.

Hob. 49.

Post. 448.

between them according to the said Submission, because it is not appointed that the one should release to the other all Trespasses and Demands, yet the Court conceived it to be well enough; for it is not intended that the Arbitrators had any intelligence given unto them, that the Defendant had any cause of Action against the Plaintiff, but only that the Trespasses were solely made by the Defendant, and the cause of Action given only to the Plaintiff; and if it were otherwise, it should have been shewn on the Defendants part, nor is it to be intended, unless it be shewn. Also Coke Chief Justice said, Where the Submission is of all Actions, Trespasses and Demands between them, and not with a Condition so that it be made upon the premises, &c. If they make an Award of part, and not of all matters betwixt them, although they have knowledge of other matters which they did not arbitrate, yet it is good enough for that part whereof they made their award; but if the Submission had been conditional, it had been otherwise, for there they ought to make the arbitrement of all matters whereof they had notice given them, otherwise it is void in all; and so he said he had known it to be adjudged: Wherefore by the opinion of Coke Chief Justice, Croke and Doderidge, it was adjudged for the Plaintiff, Houghton hæsitante. Co. lib. 8. fol. 98. 7 H. 6. 40. 20 H. 6. 14. 22 H. 6. 34.

Higgins *versus* Totherden, Mich. 9 Jac. Rot. 626.

DEbt upon an Obligation, wherein he demands 30l. The Defendant demands Oyer of the Obligation, which was, Noverint universi per præsentem me Johan. Totherden teneri & firmiter obligari in trigintate libris, &c. And this being entred in hæc verba, the Defendant demurred in Law, for it was objected, that trigintate is not any word, nor hath any sense, and therefore the Obligation is void: Sed non allocatur; for although there be an addition of two letters, it is but a Surplusage, and shall not make the Bond void; and it was adjudged accordingly for the Plaintiff: And Error being brought in the Exchequer-Chamber, without any argument, the Judgment was this Term affirmed.

(10)
Hob. 18.
Ant. 309.
2 Rol. 147.

Post. 603

Post. 607.

VVeald and his VVife *versus* Pease.

Action upon the Case; for that the Defendant being Vicar of the Parish where they inhabited, falsely and maliciously in such a Court of the Ordinary, presented, that they made Day upon the Sunday: Whereupon they were cited and bered, &c. After Not guilty pleaded, and Verdict found for the Plaintiffs, It was moved in arrest of Judgment, that the Action lies not for Baron and Feme; for their Veration is several, at least wile the Feme cannot have damages for the Veration to her Husband.

(11)

5 Cr. 553.
Post. 473.

Ant. 134.
1 Cr. 291.
Ant. 351.

Secondly, that for this presentment in course of Law, and also in the Spiritual Court, this temporal Action lies not; the Court doubted upon these reasons and exceptions whether the Action were maintainable; and therefore it was adjourned.

Rigley *versus* Lee and his VVife.

(12)

1 Cr. 509.
Ant. 19.
Hob. 129.

Ejectione firmæ: After Verdict for the Plaintiff, it was moved, that the Baron was dead since the Nisi prius, and before the day in Banco: And whether the Bill should abate in all, or should stand against the Feme, was the question: And because it is in nature of an Action of Trespasse, and the Feme is charged for her own fact; it was adjudged that the Action continued against the Feme, and Judgment should be entred against her sole, because the Baron was dead.

Elizabeth Slymbridg's Case.

(13)

Co. Litt. 289. a

1 Inst. 289. a

Elizabeth Slymbridg, upon a special Supplicavit out of the Chancery was committed to prison for want of Sureties, and upon suggestion to the Court, that she had been imprisoned for divers weeks, and was big with Child, and should be in danger of death, if she should not be enlarged: Coke Chief Justice said, that they at their discretion might let her to Bail, upon common or mean Bail to prevent the peril of death to her, or her Infant: And he produced a precedent in 14 Ed. 3. where one being in Execution for Debt was discharged, because he had been long imprisoned, and decrepit, and so old and stricken in years, that he could not long continue; and these reasons entred upon the Roll: And another Precedent in Pasch. 40 Ed. 3. in Cornubia, where a Feme brought an appeal against 12 who were acquitted, and upon Enquiry of Damages it was found that she sued it maliciously; and being committed to prison for their Damages: Afterwards upon suggestion, that she was big with Child, and near her deliverance, she was released upon Bail; and he said, that both these Records were in the Treasury.

Metcalf *versus* Wood.

(14)

Ant. 324.

Co. 11. 38. a
Co. Litt. 139. b

Error of a Judgment in Account, after the first Judgment, quod computet, and before the second Judgment; and whether a Writ of Error lies before the second Judgment, was the question: And it was resolved, that in this Case it lay not; For the first Judgment is no other than an award, and no final Judgment, until he hath accounted before Auditors; and the death of any of the parties before the second Judgment shall abate the Writ; and the Plaintiff may be non-suited before the second Judgment; and this first Judgment doth not determine the

the original; and a Writ of Error lies not unless in special case, where the original is not determined. But Coke said, that he had seen a President, 8 H. 8. where an Exigent being awarded in an Appeal, a Writ of Error was brought maintainant: For he by the Exigent awarded in case of Felony, forfeited all his goods maintainant; wherefore for as much as he was at present loss and prejudice, he should have a Writ of Error presently.

Co. II. 41. a

Peplow *versus* Rowley.

ERror of a Judgment in Salop; the Error assigned was, for that in an Action upon the Case there tried, the Defendant was essoined, and had day *per essoyne*, & Querens habuit eund. diem; at which day the Defendant being demanded, appeared not, but made default; Et habuit diem per default secundum consuetudinem villæ prædictæ given by the Court, (viz. such a day) at which day the parties appeared, and Judgment was given against the Defendant, *per nihil dicit*; so the Plea was utterly discontinued, because when the Defendant made default, no day can be given unto him, when he was out of Court. And the Allegation that it was done secundum consuetudinem, cannot help it; for no custom can help that which is against Common Law, and an apparent discontinuance: Wherefore the Judgment was reversed.

(15)

1 Cr. 254.

Ant. 314.

1 Cr. 341.

Lovet *versus* Fawknor.

Action upon the Case; for that he at the general Goal-delivery for the County of Warwick, held at Warwick 6 Aug. 8 Jacobi before Sir Peter Warberton one of the Justices of the Common Bench, and Sir Tho. Foster another of the Justices of the Common Bench, Justices of the Peace, nec non ad diversas felon. audiend. & termin. assignat. The Defendant falso & malitiose sine ulla vera & legitima causa procured the Plaintiff to be Indicted; That he voluntarie, felonice & proditorie endeavoured and practised to perswade and withdraw the Defendant, being a Subject of the Kings, from his obedience, unto the Romish Religion against the force of the Statute, &c. and imprisoned and detained him, until at the same Goal-delivery before the said Justices, he was debito modo & secundum legem, &c. acquietatus; and Judgment given upon a *nihil dicit*: And a Writ of Enquiry of Damages being awarded, 55 l. Damages were found and returned: And it was now moved in Arrest of Judgment, That the Declaration was not good, because that it is of an Indictment at a Goal-delivery before, &c. And he doth not shew that they were Justices ad Gaolam deliberand. assignati: And although it be shewn that they were Justices of Peace, and of Oyer & Terminer, and were in truth Justices of Assise, & ad Gaolam deliberand.

(16)

Lat. 80.

2 Bull. 270.

Ant. 32.
3 Cr. 199.

Jones 93. 4.
1 Cr. 15.
Co. 9. 55. 6.

deliberand. yet because it was not shewn that they were Justices ad Goala deliberanda, in whose right the Indictment is taken; the Court held that the Declaration was not good: But Coke said, that he conceived that for another cause the Action lay not; for no Conspiracy, nor Action upon the Case in nature of a Conspiracy, lyeth for the procuring one to be Indicted of Treason; for every man is bound to discover Treason, and ought not to conceal it for the least time, because it is against the State of the Commonwealth, which every one is in duty to maintain; and Treason is secret, and lyeth in the heart of man, and everyone is bound to disclose such matters as tend thereto: And it being dangerous for any man to conceal any thing which may tend to Treason, therefore the procuring one to be Indicted concerning it, is no cause of Conspiracy: For although an Action upon the Case hath been maintained, for procuring one to be Indicted of Felony, yet such an Action was never brought for procuring one to be Indicted of Treason: Wherefore they would well advise whether such an Action did lye; whereupon the Judgment was stayed, quousque
No Judgment ever was given.

Middletons Case, Trin. 12 Jac. Rot. 15.

(17)

Error by Middleton and others, to reverse an Outlary: The first Error assigned was, because the Capias was awarded against 5, viz. 3 men and 2 women, and so the Exigent; the return was quod ad quantum Comitatum, &c. non comparuerunt. And he doth not say nec eorum aliquis comparuit; and this was held to be a manifest Error. The second Error, because the Exigent is returned, Ideo per judicium Coronatorum utlagati sunt: And he doth not shew that there is any Coroner or his name: But the Court doubted thereof; for all the Exigents in London are so returned, where the Mayor is Coroner. The third Error, because it was returned, utlagati existunt, where for the Women it ought to have been waiata existunt: Wherefore the Outlary was reversed.

Post. 531.

Goodman *versus* VWilliam Knight, Trin. 11 Rot.

(18)

Covenant: And declares that the Defendant and one Agnes Knight by such an Indenture, bargained, sold, infeoffed, and confirmed to the Plaintiff Lands in Fee in Wentmore, reciting that Robert Knight by his Will in writing devised those Lands unto him in Fee, and that the said William Knight covenanted with the Plaintiff, that he and the said Agnes tunc habuerunt virtute predictæ ultimæ voluntatis plenam potestatem, bonum jus, & legitimam autoritatem, to alien and sell the said Lands to the Plaintiff in Fee, and assigneth the breach, that Rob. Knight died seised of the said Lands, and made not any Will; whereby the Lands descended

descended to John Knight his Heir, who entred and expelled the Plaintiff; for which he brought this Action. And upon this the Defendant demanded *Oyer* of the Indenture, which was entred in hæc verba: *Whereupon the Defendant demurred generally; and the cause was, for that the Declaration varies from the Indenture; viz. because the Covenant is in this manner. And the said William Knight and Thomas Knight (whereas Thomas was not party to the Indenture, nor ensealed the same) do covenant for them and their Heirs to and with the said Thomas Goodman, that they the said William Knight and Agnes now have, his Heirs and Assignes by force and vertue of the said Will, do own full power, good right, and lawful authority to alien, &c. And for this variance betwixt the Covenant mentioned in the Declaration, and this Indenture shewn, Richardson Serjeant moved, that the Declaration was not good: for the Covenant (as it is in the Indenture) is void and insensible, whereof no benefit can be taken: But all the Court held, that the Declaration was good; for the addition of Tho. Knight in the Covenant is idle, he being no party to the Indenture; and for this cause the omission of him in the Declaration, is as it ought to be: Also the words of the Covenant, his Heirs and Assigns by force, &c. do own, &c. being insensible, the party in the Declaration omitting them and reciting the Covenant in that which was sensible, and laying the breach therein, is good enough; and he needed not shew that which was insensible: Wherefore it was adjudged for the Plaintiff.*

VWhistler versus Lee.

Error of a Judgment, in an Action upon the Case in Abingdon Court; the Error assigned was, for that the said Court is mentioned to be held there before the *Mayor*, secundum consuetudinem Burgi, a tempore cujus contrarium memoria, &c. And it doth not appear that there was not any such custom there to hold Pleas: Upon this Error assigned, it was demurred in Law, for it is against the Record to assign such matters for Error, it being pleaded there, and Judgment given against him; and if it be true that there be no such custom, then the proceedings are coram non iudice, and he is not grieved thereby, but he may have Faux imprisonment, if he be arrested by vertue of such a Judgment, or other Actions, if his goods be impeached thereby: And of that opinion was the whole Court, that this assignment being directly against the Record, is not receivable: Wherefore rule was given to affirm the Judgment.

(19)

Ant. II. 244.
Post. 521, 568,
597.

Halfey versus Carpenter, Trin. 12 Jac. Rot. 1006.

DEbt upon an Obligation, conditioned for the payment of 30*l.* to H. S. J.S. and A. S. tam cito as they should come to the age of 21 years: He pleads, that he payed those sums tam cito as they came of age; and it was thereupon demurred, because it is not

(20)

not shewn when he came of age, and the certain time of the payment; and for this cause all the Court held the Plea to be ill; for although it be a good Plea regularly to the condition of a Bond, to pursue the words of the Condition, and to shew the performance, yet Coke said, there was another rule, that he ought to plead in certainty, the time, and place, and manner of the performance of the condition, so as a certain Issue may be taken; otherwise it is not good: Wherefore because he did not plead here in certainty, it was adjudged for the Plaintiff: And between the same parties in another Action of Debt, upon an Obligation, the Condition being for performance of Legacies in such a Will, he pleading performance generally, and not shewing the Will, nor what the Legacies were; It was adjudged for the Plaintiff.

Sir Henry Rolls *versus* Boulting and Roberts.

(21)

TRESPASS, for entring into his Close, averiis depascendo, and chasing the Plaintiffs Beasts in the same Close: The Defendant pleads to all, besides the entring into the Close with two Horses, and chasing the Beasts there, Not guilty; and quoad the entry and chasing he pleads, that one Richard Lewis was Parson of Kelmark, within which Parish this Close lies; and that he by writing under his hand and Seal, dated such a day and year, let the Tythes of the said Close to Sir Robert Osborn for three years; whereupon they as his servants entered the said Close, with their Horses, & molliter chased the said Cattel in the said Close, to see what Tythes were due for them, quæ est eadem transgressio: And it was hereupon demurred; First, because he justifies by vertue of a Lease for years of Tythes, and shews not the Deed of the Lease; and although he justifies but as a servant, yet coming in by Title and in privacy, he ought to shew it as well as the Master, and cannot plead the Entry into anothers soil, without making good Title thereto, which ought to be by the shewing of the Lease; And of that opinion was the whole Court, that in as much as he had not pleaded by Deed here shewn, &c. that the Plea was ill. Another reason alledged against the Plea, was, because they cannot justify their riding upon the Land, nor chasing the Cattel up and down to see what Tythes were due; for there were other means to come to the knowledge thereof. But the Court did not thereto deliver any opinion, but upon the first exception the Plea was adjudged to be ill; and Judgment given for the Plaintiff.

Ant. 317.

Barret *versus* Winchcomb.

(22)

JOAN Barret, Administratrix of John Barret, brings Action upon the Case, tam pro Rege, quam pro seipsa, against Bennet Winchcomb Sheriff of Oxford; for that she sued a Writ of Debt out of the Chancery, against one Juxon, and thereupon had

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a Capias and Exigent, and he was Outlawed, and he sued a Capias Co. s. 88. a.
 utlagat. directed to the Defendant, who by virtue thereof arrested
 the said Juxton, and afterwards suffered him to go at large; where-
 upon he brought this Action: After Verdict for the Plaintiff, it
 was moved in arrest of Judgment; First, that an action upon the
 Case lies not for the King and party, for the damages are only to
 the party: Sed non allocatur; For in regard the Capias utlagatum
 is for the King, and the King is to have benefit thereby, although
 the party is also to have benefit, yet the Action lies for the wrong Post. 533. 620.
Ante 134.
 done to the King and party, in the name of the King and party.
 Secondly, the Court held that this Action lies without shewing who
 committed the Administration, or that he had authority to com- Hob. 38.
 mit Administration. And thirdly, that it was well enough, although
 it is not said it was in retardationem testamenti. Wherefore it was Post. 545.
 adjudged for the Plaintiff. And in another case betwixt the same
 parties (where the Plaintiff was non-suited in another action
 brought before upon the same matter) it was ruled that the Defen- 8 El. cap. 2.
 dant should not have costs, because he brought the Action as Ad-
 ministratrix; and although it be not shewn, that the Debt was
 due to the Testator, yet when he brings it in the Detinet, it shall
 be intended he brought it in his right, and then he shall not pay
 costs upon non-suit; For that is out of the Statute. 1 Cr. 29. 219.
Ante 229.
3 Cr. 503.

Moyle *versus* Ewer, Mich. 10 Jac. Rot. 171.

DEbt upon the Statute of 2 Ed. 6. and demands 165 l. For (23)
1 Rol. 655.
 that whereas by the Statute made 2 Ed. 6. it is provided, &c.
 (Reciting the clause in the Statute concerning the setting forth
 of Tythes, &c.) And whereas the Plaintiff 30. Septemb. 6 Jac. was
 Proprietor of the Rectory of Cavesfield, and of all Tythes within the
 said Parish; and whereas the Defendant 1. Septemb. 5 Jac. was
 possessed for divers years to come of 300 Acres of Land within the
 said Parish, whereof 130 Acres were sown with Wheat, 120 Acres
 were sown with Barley, 40 Acres with Pease, and 10 with Oats;
 and whereas all Tythes were usually paid in specie for those Lands
 for 40 years before the said Statute; and whereas the Defendant
 the said 30. Sept. 6 Jac. sic inde possessionatus existens all the grain
 ad tunc crescent. upon the said lands, did mow and cut down, and all
 the grain inde provenient. apud Caverfield did take and carry away,
 without setting forth of Tythes, and without agreement with the
 Plaintiff, ad tunc proprietarius of the said Rectory: Et dicit in factis,
 that the Tythe of the corn in the year of 6 Jac. so taken and car-
 ried away, was then worth 55 l. And the treble value was 165 l.
 per quod actio accrevit to the Plaintiff to demand the 165 l. afoze-
 said: Notwithstanding the Defendant had not paid unto him the
 said 165 l. Et ideo producit sectam: The Defendant protestando
 A a a that

that it is not of such value ; For the plea saith, that the Plaintiff himself sowed that corn, being possessed of the said Land for divers years yet to come ; And 5 Junij, 6 Jac. sold the corn to the Defendant ; wherefore he took it ; and traversed that he was possessed from the time, &c. And it was thereupon demurred, and adjudged for the Plaintiff, that he should recover 165 l. as he had declared : And now a Writ of Error was brought, and the Errors assigned were, that the Declaration was not good. First, because all the matter of the Declaration, and the offence is by way of Recital ; and the offence is not alledged by matter in fact, that he carried away the corn, and that the Tythes were not set forth ; Sed non allocatur ; For it is sufficiently alledged as well as if it had been by express charge, and the Action is brought for non-payment of the treble value, and the other is but to shew the cause how it became due. Secondly, because the Plaintiff misrecites the Statute ; For whereas the words of the Statute are, that he ought to agree with the Parson, Vicar or other Owner, Proprietor or Farmor of the said Tythes, &c. The words of the Declaration are, Cum rectore, vicario, aut alio proprietario seu firmario, omitting the word (Owner :) Sed non allocatur ; For Owner and Proprietor are all one and Synonyma, and of the same sense, and the omission of that word not material. Thirdly, for that he saith, that he was Proprietor, but he doth not shew how, nor any title : Sed non allocatur ; For it is but a conveyance to the Action. Fourthly, because it is not shewn, by whom the corn was sown : Sed non allocatur ; For Non refert by whom it was sown, the Defendant being Owner at the time of the reaping ; and although the Declaration be, that 1. Septemb. 5 Jac. he was possessed of Lands sown with corn, and that 30. Septem. 6 Jac. he thereof being so possessed, mowed and cut down, which being a year and month after, cannot be well intended ; yet being possible, the Declaration is good enough. Fifthly, for that there is not any time alledged of the caption or alportation : But the Court conceived, the Declaration being, that he 30. Sept. 6 Jac. sic inde possessionatus of the said Land, messuit granum prædictum, it is to be intended, that he reaped it the same day ; And the Declaration being, ac totum granum inde provenient. cepit & alportavit, although he doth not say, ad tunc ibidem, yet it is coupled with the former time by the word (ac) and hath reference to the former time : And they said, that if any one will buy corn standing of the Proprietor of a Rectory, if he hath not special words to discharge it, he ought to pay Tythes ; and the carrying away of such corn without setting out the Tythes, is an offence within the Statute : wherefore the Judgment was affirmed, That he should recover the treble value, as he had declared.

Codner *versus* Dalby, Hill. 8 Jac. Rot. 979.

DEbt upon an Obligation, conditioned to save himself harmless from such a bail in such an Action: The Defendant pleaded Quod libere & absolute exoneravit him of the said Bail; And it was thereupon demurred, because he doth not shew how he discharged him; and without argument, it was adjudged for the Plaintiff: For always when one pleads a discharge, and that he saved him harmless, he ought to shew how, that the Court might adjudge thereof: But he may plead generally Non damnificat. without shewing how, because he pleads in the Negative, and the other ought to shew damnification: Wherefore it was adjudged accordingly for the Plaintiff.

(24)

Moor 857.
Ante 165.
Post. 634.
Co. 2. 4. a.
Hob. 13. 296.
Dier 43. a.

Beston *versus* Buller.

SCire facias against the Defendant, being bail in Yarmouth, in an Action of Debt; For that the Principal did not render his body after Judgment, nor pay the condemnation: The Defendant pleaded, that after the first Action brought, and bail found, the cause was removed by Habeas corpus, and bail here accepted; and afterwards the cause was remanded by Procedendo, and then Judgment given against the Principal: So it was pretended, that by removal of the cause, the old bail was discharged: Whereupon it was demurred, and now argued at the Bar, that the old bail was discharged by the Record removed; And although the Record be remanded, yet that cannot revive the bail which is determined; and for this purpose were cited 32 Hen. 8. Bro. Mainprise 6. and 31 Hen. 8. Br. Procedend. 13. If a man finds bail in London upon an arrest, and the cause is removed by Habeas corpus into the Kings Bench, and afterward remanded by Procedendo, the bail is dismissed, and shall never be revived. But all the Court held, that the bail is in this case chargeable; For when the Record is remanded by Procedendo, it is as if it never had been removed, and there is no Record of the removal thereof; but if it be removed, and bail filed in this Court, and afterwards in another Term it is remanded, then it is otherwise; For there the Court is possessed of the cause, and remained so for a Term, and a Record is made thereof: But if it had been remanded the same Term that it had been removed, it had been otherwise; For there is no Record made thereof, and so Brook is to be intended: Wherefore it was adjudged for the Plaintiff.

(25)

Moor 836.

Ante 203. 47

Termino Hillarii,

Anno duodecimo JACOBI Regis in Banco Regis.

Thomas Hyats Case.

(1) **T**homas Hyat prayed a Prohibition to the Consistory Court of London; For that he was sued there by his wife, to be separated from him propter sevitiam; And sentence was there given against him, that his wife should live from him, and that he should allow her 5 s. 6 d. weekly, although the husband offered reconciliation, and desired cohabitation, and proffered caution to use her fitly. But it was denied by the Court to grant a Prohibition, because the Court of the Ordinary is the proper Court for allowance of alimony, and may take order for separation or divorce, if she be cruelly used.

1 Cr. 220.

(2)
Co. 11. 65. b.

Co. 11. 77. a.

Co. 11. 78. a.

Note, That Coke said upon the argument of *Warren and Smiths* Case, concerning a Lease by a Colledge made to Queen *Eliz.* that it was adjudged in 30 *Eliz.* in *Barods* Case, That where an Infant, or *Baron* and *Feme* make a conveyance to the Queen by Bargain and Sale, that it was not aided by the Statute of 18 *Eliz.* For that aids only in Cases where there is imperfection in the conveyance, and not where there is a disability in the person who makes the conveyance: But where Tenant in Tail makes a conveyance by Deed, that is aided by the Statute; For he may make a conveyance by Fine.

Sir Henry Bellasis *versus* Hanford.

(3)
1 Rol. 895.
899.

3 Cr. 706.

Action for words; The Plaintiff had Judgment Octab. Michael. 10 Jac. and no process of Execution was sued out in the year following: But afterward, viz. 27. Novemb. 11 Jac. Hanford brought a Writ of Error, returnable in the Exchequer Chamber. The Record being removed, the Plaintiff prayed a day to assign Errors, and at the day appointed did not assign any, but was non-suited for not prosecuting, and the Record remanded hither 12 Jac. And this Term Hanford being imprisoned for other causes, it was moved, that he should be in execution for this cause, and although the year and day were passed after the Judgment, so as the Plaintiff was put to his Scire facias to have execution, yet forasmuch as the Defendant had brought a Writ of Error, Man the Prothonotary said, that he himself had thereby renewed the Record; And the Record being remanded, the Plaintiff shall

shall have execution without a Scir. fac. and so all the presidents warrant it: Wherefore upon his report, that the course of the Court was so, Rule was entred, that he should be in execution without a Scire facias.

Chamberlaine *versus* Ewer.

COvenant; After Judgment in this Court and the Record removed by Writ of Error, and the Error assigned for variance between the Bill upon the File and the Declaration, viz. That in the Declaration, it was, that one such, after the death of *tenant pur autre vie* primo intravit & sic fuit occupans; which was the substance of the Declaration; But in the Bill upon the File these words primo intravit were omitted: And after the Defendant in the Exchequer-Chamber had pleaded, In nullo est erratum, It was moved there, that the Bill should be amended: For the paper-book, by which the Bill was ingrossed, had those words in it; And the Court (seeing them in the paper-book) gave rule that they should be amended. (4)
2 Rol. 151.

Syvedale *versus* Sir Edward Lenthal in the Exchequer.

INformation for the King and himself; Supposing that the Defendant after the end of the second Sessions of Parliament holden 5. Novemb. 3 Jac. and before the 31. Octob. 9 Jac. was a Recusant-Papist convicted in due form of Law, according to the Statute. And after his conviction, and for two years before the 31. Octob. 9 Jac. at the Parish of Saint Dunstons in the West in the County of Middlesex, seipsum conformavit, and came to Church, and there continued during the time of Divine Service, according to the Statute; Notwithstanding the Defendant for three years next after the 31. Octob. 9 Jac. had not received the Sacrament of the Lords Supper, &c. in the said Church, where he usually inhabited during the said time, nor in any other place; but had made Default Contra formam Statuti, wherefore he demanded against him 60 l. for every year: in toto 180 l. The Defendant pleaded Not guilty, and found against him; And after Verdict, it was moved in arrest of Judgment. 1. That the information was uncertain; Because no certain time of the conviction is shewn, nor how, nor in what Court, nor before whom; so as the party cannot have answer thereto: Sed non allocatur; For Tanfield chief Baron said, that it might peradventure have been a good Exception, if he had demurred upon the Information: But now, that he hath pleaded Not guilty, all this is admitted, and it is only to be given in evidence; and the matter in fact is only triable, whether he hath received the Sacrament. As in Debt upon an Obligation, no place is shewn, That is not good; But if the other pleaded a Release, the Exception (5)
Post. 375, 610.
611.
Ante 125.

on to the Declaration is saved. A second Exception was taken ; Because it is not shewn when, or before whom, he conformed himself : Sed non allocatur ; For being for two years before 31. Octob. 9 Jac. it is sufficient to entitle the King to the penalty ; and the conformity by coming and continuing at Church in time of Divine Service is sufficient without being before the Ordinary. Thirdly, for that the Informer demands the penalty for three years, whereas by the Statute of 31 Eliz. No Informer can demand a penalty upon a Penal Statute ; But by Information exhibited within a year after the Offence, but the Court held it to be well enough for the King, although it was not good as to the Informer.

1 Cr. 331.
Post. 530.
Moor 58.

Ward *versus* Ayre.

(6)
2 Rol. 566.
Moor 20.
2 Rol. 566.

T Respals of Assault and Battery ; Et quod cumulum pecunie containing five marks, cepit, &c. The case was this, The Plaintiff and Defendant being at play, the Plaintiff thrust his money into the Defendants heap, and mixed it ; and the Defendant kept it all : Whereupon (they striving for the money) the Plaintiff brought this Action : And the whole Court was of opinion, in regard the Plaintiffs own money cannot be known, and this his intermedling is his own act, and his own wrong, that by the Law he shall lose all ; For, if it were otherwise, a man might then be made to be a Trespasser against his will, by the taking of his own goods : Therefore to avoid that Inconvenience, the Law will justify the Defendants detaining of all ; and so it is of an heap of corn voluntarily intermingled with another mans : whereupon the Rule of the Court was, Quod querens nihil capiat per billam.

Frances *versus* Ley, & e contra, In the Star-Chamber.

(7)
Post. 605.
Hob. 69.
Moor 878.
2 Rol. 288.

At the hearing all the proofs upon both Bills, the Court resolved five things : First, that if an Inhabitant and his Ancestors only, have used time, whereof, &c. to repair an Isle in a Church, and to sit there with his Family, to hear Divine Service, and to bury there ; This makes the Isle proper and peculiar to his House ; And he cannot be displaced, nor interrupted by the Parson, Churchwarden, or Ordinary himself : But the constant sitting and burying there, without using to repair it, doth not gain any peculiar property, or preeminence therein. And if the Isle hath been used to be repaired at the charge of all the Parish in common, the Ordinary may then from time to time appoint whom he pleaseth to sit there, notwithstanding any usage to the contrary. Secondly, that it is not lawful for any, to break or deface any superstitious Pictures in any window in any Church

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or Jlle, but the Ordinary only : And if any do so, without licence from the Ordinary, he shall be bound to his good behaviour ; as was done in Pricketts Case, by Sir Christopher Wray, late chief Justice of the Kings Bench. Thiedly, that Coats of Arms placed in any window, or Monument in the Church or Churchyard, cannot be beaten down, or defaced by the Parson, Ordinary, Churchwardens, or any other ; and if they be, the Heir by descent, interested in the Coat, may have an Action upon the case, as 9 Ed. 4. 14. Sir William Witches case was cited to that purpose, and Gravenors case, and a case betwixt Corbyn and Pymble : For the Heir is inheritable to Arms, as to Heirlomes, 30 E. 3. 2. 39 E. 3. 14. Fourthly, that neither the Ordinary himself, nor the Churchwardens can grant licence of Burping to any within the Church, but the Parson only ; Because the soil and freehold of the Church is only in the Parson, and in none other. Fifthly, when any is assaulted or beaten in Church or Churchyard, it is not lawful for him to return or give back any blows in his own defence, as he may elsewhere in other places. See the Statute 5 Ed. 6. the penalty for drawing a weapon in Church or Churchyard.

Co. Lit. 18. b.
Moor 878.

Termine

Termino Paschæ,

Anno decimo tertio J A C O B I Regis
in Banco Regis.

Ford *versus* Hoskins, Pasch. 12 Jac. Rot.

(1.)
1 Rol. 108.
Moor 843.

Action upon the Case, against the Defendant being Lord of the Mannor of Beaumister in the County of Dorset; whereas John Ford was Cophholder for life of the said Mannor (where the custom of the Mannor is, That a Cophholder for life may nominate his Successor to have it for life; and that such a person nominated should compound with the Lord for his fine; And if he could not compound, then he should give such a fine as the Homage of the Mannor should assess, and should be admitted, and hold for his life;) alledgeth in fact, that his father nominated him his Successor for to have for life, and died, that he tendered for his composition, and could not be accepted: Whereupon the Homage assessed a fine of 40 s. which he tendered to pay, and the Defendant would not accept thereof, nor admit him, whereby he lost the benefit thereof, nor could sell it: And thereupon he brought the Action. The Defendant pleaded Not guilty, and found against him; And it was now moved in arrest of Judgment, that this Action lies not: For although it hath been alledged that this custom pretended, is good, yet forasmuch as he who is so nominated hath not jus ad rem nec jus in re until admittance; And a Cophholder, in the eye of the Law, is but Tenant at the Lords will; and if the Lord will not hold Court, he hath no remedy to compel him to admit him, but by Order of Chancery: as Co. lib. 4. fol. 28. b. Westwicks Case, 32 H 6. 3. Lit. fol. 3. The Court held, that the Action lay not; For he hath not any interest therein: And it would be infinite if every Cophholder, upon pretence of refusal, should have an Action; For then the Lord at his peril ought to admit, which would be mischievous: And there never was any Action brought before these times against a Lord of a Mannor for Non-admittance; But always the remedy against the Lord was only in Chancery: Wherefore there is not any reason to give

Lit. Sect. 77.

give allowance to such framed Actions, newly devised: It was therefore adjudged for the Defendant. Vide 14 H. 8. 246. N. B. 47. h. That Action upon the Case lies against an Archdeacon for 1 Rol. 108. not Inducting.

Lyster versus the Wardens of the Hospital of
Ravensthorn.

Error of a Judgment in a *Formedon* in the Common Bench. (2)
First, because the writ is *Præcipe Gardianis*, *præceptori* five *Magistro hospitalis*, &c. The award of the writ of view is, *Quod faciat visum Gardiano, præceptori, &c.* so in the singular number, where it should be *Gardianis, &c.* And the return of the writ was, *Habere feci visum Gardiano*, so not well returned: Sed non allocatur; Ante 306.
For it is but a mispicion, and it is *prædicto Gardiano*, and so amendable. Secondly, because it appears by the Record, that upon the petit cape first awarded, The mise is, *Quod petens gratis remittit defaultam*; and the tenant appeared, and pleaded to the Issue: But upon a writ of Diminution, the Record certified, and upon the default, the Entry is, that the Demandant should recover Seisin; and then the proceedings after be Error: But the Court held, that in as much it was a good and perfect Record first certified, it shall never afterwards be falsified by a certificate upon the Diminution; For that is to amend a Record, and to aid it, and to have affirmation thereof: But it never shall be, to certify a contrary thing, to make it ill. Thirdly, because the writ and all the proceedings are for an house within the County of the City of York; And being at Issue upon the writ, the *postea* is certified, *Postea tali die & loco*, before Baron Altham and Baron Bromley *Justiciarius Domini Regis ad Assisas in Comitatu Eborum* (*interlining Civitatis*) the default is recorded, that it was without warrant. Afterward in *Nullo est erratum* pleaded and entered, it was moved, that it should be amended, and it was amended by Order; For it is but a *misfeasance* of the Clerk, which may well be amended after *In nullo est erratum* pleaded: Whereupon the Judgment was affirmed. Ante 277. Post. 446.

Simon Muscot versus Ballet, Hill. 12 Jac. Rot. Hunting.

Covenant; For that the Defendant by Indenture demised to the Plaintiff a Messuage and certain Land at Clerkenwell in the County of Midd. for 60 years; and covenants, that he was then lawfully seised in Fee of an indefeasible Estate; Et dicit in factum, that at the time of making the Indenture, he was not lawfully seised in Fee, and so he had not performed the said Covenant, &c. The Defendant pleaded *Non est factum*, and found against him, and damages 400 l. And it was moved in arrest of Judgment that the Declaration is not good, because the breach is too general, not shewing that any other was seised, (3) Ante 265.

Ante 304.
Ante 125.

sed, nor any cause why the Defendant was not seised: Sed non allocatur; Because as the Covenant is general, so the breach may be assigned generally, especially as this case is, where the Defendant hath made the Declaration good, by pleading non est factum: So he allows of the breach, if it had been his Deed: Wherefore it was adjudged for the Plaintiff. Vide Co. lib. 9. fol. 60. betwixt Salmon and Bradshaw, 47 Ed. 3. 3.

Shepherd *versus* Edwards, Hill. 11 Jac. Rot.

(4)

Ante 263.
Post. 619.

Error of a Judgment in Exon, before the Mayor and Bailiffs there; The Error assigned, because that Edwards the Plaintiff declared, That he being a Professor of Physick and Surgery, and so having been for divers years: And the Defendant being troubled with a disease called a Fistula, and in danger of his life by reason of that disease; the Defendant 26. Martii, 1603. in consideration that the Plaintiff at the Defendants request would with his best skill apply wholesome Medicines for the curing the Defendant of his disease, Nec non operam & concilium suum daret & impenderet to the said Defendant in ea parte, assumed and promised to pay unto him upon request, such a sum of money, as the Plaintiff for his labour and counsel in & circa curationem morbi prædicti mereret; And alledges in fact, that the Plaintiff the said 26. Martii, 1603. Et diversis aliis diebus & vicibus, betwixt the said 26th of March and the last of February following, according to his best skill, caused to be applied divers Medicines for cure of the said disease, Nec non operam & consilium suum per idem tempus in ea parte dedit to the Defendant; And that the Defendant as well by the means of the said Medicines as by the labour and counsel of the Plaintiff, was by the said last of February, 1603. well cured of the said disease, and made whole. And he saith in fact, That he well deserved an hundred pounds for his labour and counsel bestowed about the curing of the said disease: And that the Defendant, although he had been required, had not paid the said hundred pound, nor any part thereof. The Defendant pleaded Non assumpsit, and found against him: And thereupon the Plaintiff had Judgment, although it were objected, quantum mereret was insufficient and uncertain.

Sir Edward

Sir Edw. Pynchyn *versus* Doctor Harris in the
Exchequer.

NOte, that upon evidence in an Information by Sir Edward (5)
against the said Doctor, upon the Statute of 32 H. 8. for
buying an Advowson of *Tho. De Banck*, who had not been in pos-
session, &c. A question was made, if the Incumbent of a Church
purchase the Advowson thereof in Fee, the Advowson being held
in Socage, and deviseth, that his Executor shall present after his
decease; and deviseth the Inheritance to another in Fee: Whether
this be a good devise of the next Avoidance, because that instantly
by his death, when his Will should take effect, the Church is void; *Lit. Sect. 734*
So a thing in Action and not devisable: But it was held to be good
enough; For the Law is so, that all shall be good, according to the
intent of the party expressed in the Will.

Termino Trinitatis,

Anno decimo tertio J A C O B I Regis in Banco Regis.

Bateman versus Woodcock.

- (1) **T**RESPASS of Assault, Battery, and Wounding in London; The Defendant justifies in the County of Norf. by vertue of a Warrant from the Sheriff of Norf. upon a Writ of Latitat, quæ est eadem transgressio, &c. absque hoc, that he is guilty in London vel alibi extra comitatum Norf. Upon this it was demurred, because he doth not shew the Warrant hic in curia prolat. Sed non allocatur; For the Warrant being executed, is returned to the Sheriff, and therefore not requisite to shew it: But otherwise it is, where he justifies for a Rent-charge, or such things which have continuance. Secondly, because he justifies, and also Traverteth, which he ought not to have done: But the Court held it to be well enough; For the justification being in another County, the County wherein the Action is brought ought to be traversed, and the Plaintiff may maintain the Action, and issue if he will, or he may traverse the Defendants plea, at his Election.

1 Cr. 447.
Co. 10. 92.

Ante 45.

Wheadon versus Sugg, Pasch. 12 Jac. Rot. 653.

- (2) **E**RROR of a Judgment in the Common Bench; The Error assigned in point of Law, the case was; A Lease was made to Rob. Grubham, whereof the Land in question is parcel, habendum to him, and Joan his wife for their lives, & eorum diutius viventi successive uni post alterum sicut scribuntur & nominantur in ordine: It was adjudged that this was a good remainder to Joan, in whose right the Defendant made consuance. A second Error assigned was, because the Judgment being upon a demurrer, a Writ of Enquiry of Damages was awarded, and the writ mentioned that the Plaintiff was non-suited; Ideo ad inquirendum occasione præmissa, whereas the Judgment was upon Demurrer, yet because it was a Judicial Writ, it was adjudged that it should be amended: and that the Judgment should stand. A third Error assigned was, because the Bar being consuance, the Plaintiff demurred, for that the Advocare was insufficient; whereas it ought to have been cognitio; And the Defendant rejoined, quod Advocare est sufficiens; And the Judgment was, Eo quod cognitio fuit sufficiens, &c. It was adjudged for the Defendant that he should have return, &c. Thereupon rule

Ante 14.

rule was given that Judgment should be affirmed. But afterwards the Court being moved again, they doubted whether they should amend the second Error; For the Writ being to enquire after non-suit, *Que damna sustinuit occasione præmissa*, it being after a Demurrer, and the Inquisition taken thereupon, and the Judgment for the damages upon that Writ; they gave rule, *Quod curia advisare vult*: until the next Term: Afterwards in *Hill. 14 Jac.* it was ordered to be amended, and the Judgment to be affirmed.

Ryppon *versus* Bowles, *Hill. 12 Jac. Rot. 123.*

Action upon the Case: Whereas the Plaintiff 1. Septemb. 40 Eliz. was seised in fee of a Messuage and Chamber in Noundell; And Thomas Henson was then possessed of a little Shed adjoyning to the said house; And at the said 1. Septemb. 40 Eliz. and from the time whereof, &c. there was a window in the said house looking towards the said Shed, by which window only, and by no other means, the light came into the Chamber of the said house; That the said Thomas Henson, 30. Septemb. 40 Eliz. Erected a building upon the said Shed, so near adjoyning to the said house, that it stopped up all the light of the said window, so as he lost all his light; And that the Defendant 1. Septemb. 10 Jac. being possessed of the said building newly erected, had continued and not moved it from the first day of Septemb. 10 Jac. until the day of the Bill; per quod actio, &c. The Defendant pleaded Not guilty, and found against him; And now moved in arrest of Judgment, that this Action lies not against the Defendant: For although an Action lies against him who erected it, (as it was agreed by all the Court) yet against the Defendant, who is only for years, and inhabits only therein, and hath committed no other Act to prejudice the Plaintiff, and who hath not authority to abate it (but if he should, would be chargeable in an Action of Waste) the Action is not maintainable against him. And it is not like the Lady Browns case, for the turning of a Cock; nor to a *Dier 319.* Penthouse, which over hang another mans Courtyard; For the falling of every shower of rain is a new nuisance; but here it is only inhabitancy, which is not any nuisance: And if the Plaintiff should have any remedy, it should be by a *Post. 555.* Quod permittat against the Tenant of the freehold: And to that opinion Coke chief Justice inclined, though the other Justices doubted therein: But afterwards it appearing that the Plaintiff had procured Judgment to be entered without motion to the Court, the Defendant was put to his Writ of Error. *Vide 4 Aff. 9 Eliz. Dyer.* (3)

Cob versus Betterfon.

(4)
1 Roll. 832.
Post. 444.

1 Rol. 832.

A Copy was granted to the Father and to his Son; And he avers, that at the time of the Grant he had but one Son only; And it was adjudged to be a good limitation to that Son. And Coke cited that 29 Eliz. Winkmores case, where a Copy was granted to the Father and to his Son, and he doth not demonstrate which of his Sons should have it; It was adjudged to be a void Grant, for the incertainty, he having divers Sons at that time.

Slade versus Thomson, Hill. 9 Jac. Rot. 530.

(5)
1 Rol. 421.

TRESPASS: Upon special Verdict, the case was; One deviseth for life, remainder to one and his Heirs, paying such a sum by him in remainder out of the Issues and Profits of the Land; He in remainder dies, his Heir within age, living Tenant for life; Tenant for life dies, and being found by office that the Land was holden by Knights Service in capite, the King seised it; And afterwards for non-payment during the minority, the Heir of the Devisor enters, after Livery sued: And whether this entry be congeable, was the question: And adjudged, that it was not; For the sum being appointed to be paid out of the Issues and Profits of the Lands, it is to be intended, when he shall receive them: But the King having taken the profits, he shall not pay them.

Termino Michaelis,

Anno decimo tertio J A C O B I Regis
in Banco Regis.

Sir John Karne *versus* Pryther.

ERror of a Judgment in the Common Bench in Debt upon an Obligation of 300 l. conditioned: Whereas one Tho. Fryman, held such Copyhold Land parcel of the Mannor of D. in the County of Glamorgan, whereof Sir John Karne is Lord; If he within six months after the death of the said Tho. Fryman granted that Land by copy to the said Plaintiff and two others whom the Plaintiff should name, for three lives, according to the custom of the Mannor, that then the Obligation should be void: The Defendant pleaded, that the Plaintiff had not nominated unto him for whose lives he should grant: The Plaintiff replies, that the custom is, that the Copyhold Tenements there are grantable for three lives there successive; and that Thomas Fryman died there such a day: And that within six months after, viz. such a day, Sir John Karne granted it at Bristow to J. S. and to two others for their lives, who are yet alive: The Defendant pleaded Non concessit, and found against him, and Judgment for the Plaintiff, and Error thereof brought and the Error assigned, because the Plaintiff in his replication, shews not, that the Lands were Copyhold, and then there is not any breach; Sed non allocatur; for the condition reciting, that it is Copyhold Land, and that a grant should be made thereof by copy, he is Estopped to say, that it is not Copyhold Land; and the Issue being whether it were granted by copy Prout in the replication, it is thereby admitted on both sides. A second Error is, because the trial is de vicineto de Bristow, whereas it ought to have been out of the Mannor where the land is, or out of the next English County: As in Edens case, the issue being Si Rex concessit per literas patentes, the trial shall be where the land lies, and not where the Patent was made: Sed non allocatur; For here the trial shall be where the Grant is alledged to be made: For in the first case, the Patent is of Record; and if it be traversed, it shall be tried by the Record; And therefore the Issue being upon Non concessit, the Issue is not upon the Patent: But where the Issue is upon Non concessit, or non dimisit, of a thing which passeth by Deed, the Trial shall be where the Grant or Demise is alledged: But of a Feoffment or Lease for life pleaded, the Issue being non

(1)

Ante 365.
Post. 406.

Co. Lit. 125. b.
Co. 6. 15. b.
Pl. Com. 231. b.

Ante 142.

Feoffavit,

Feoffavit, or non dimisit, *Livery* ought to be made : And therefore the trial shall be de vicineto where the Land lies : Wherefore the Judgment was affirmed.

Sympson *versus* Sothern, Hill. 2 Jac. Rot. 679.

(2)
2 Rol. 791.

TRespass, de clauso Fracto in Ellington: Upon Not guilty pleaded, and special Verdict, It appeared, that the place where is Cophold, parcel of the Mannor of Ellington demisable in Fee ; And that Richard Sympson was a Cophholder thereof in Fee ; and in 41 Eliz. surrendered the said Close, Habendum à tempore mortis prædict. Rich. Sympson ad opus & usum of his Child, then in *ventre sa mere*, and of his Heirs and assigns for ever : And if it happen that the Child die before his full age, or marriage, then I do surrender the said Lands to the use of my Cousin John Sympson and his Heirs and Assigns ; That Richard Sympson died, that his wife had Issue by him Joan, who was the Child in *ventre sa mere* at the time of the surrender ; That the said Joan died within two months after ; That the said John Sympson was afterward admitted to hold to him and his Heirs : That afterward Eliz. Spink, which was Heir to the said Joan, and Sister and Heir of Rich. Sympson, was admitted, and entred, and let to the Defendant for three years ; The Defendant entred, the Plaintiff brings Trespass ; Et si sup. totam materiam, the Court shall adjudge for the Plaintiff : They find for the Plaintiff ; if otherwise, for the Defendant : And after divers arguments at the Bar, the Court resolved for the Defendant ; First, that this surrender Habendum after death, to the use of another and his Heirs is merely void : For a Cophholder in Fee cannot surrender Habendum after his death, no more then a Tenant in Fee can convey his Lands Habendum after his death, for then he should leade a particular estate in himself which is against the rules of Law : And there is not any difference betwixt a Cophhold and Freehold as to that purpose. And Coke said, that Pasch. 23 Eliz. in one Clamps case in this Court, it was adjudged, that such a surrender of a Cophhold Habendum after his death, was void : And it was adjudged also betwixt Hogg and Cross, that a Lease for life Habendum after his death, and *Livery* being made secundum formam Chartæ, is merely void. Secondly, they resolved, that this surrender to the use of John Sympson and his Heirs, if it happens that his Child in *ventre sa mere* die within age, is merely void ; For he cannot make such a conditional surrender, to operate in future : Wherefore the Defendant claiming from the Heir at the Common Law hath a good Title ; And it was adjudged for the Defendant.

Co. Lit. 48. b.

3 Cr. 255.
Co. 2. 25. a.
Co. Lit. 48. b.

2 Rol. 791.

Coddington *versus* Wilkin.

TRespass; for entering his Close 10 July 44 Eliz. contra pacem Dominae Reginae Eliz. & Domini Regis nunc: After Verdict this was moved in arrest of Judgment, and held that these words, Domini Regis nunc, are but surplussage: Whereupon the Plaintiff had Judgment. (3)
Ant. 118.

Edward Maria Wingfield *versus* Bell.

REplevin for Beasts distrained; the Defendant avows for Damage feasant in his free-hold: The Plaintiff replies, that the Defendants Bailiff gave him licence to go that way with his Cartel: And Issue being upon this Licence, and found for the Plaintiff; it was now moved, that notwithstanding this Verdict, Judgment ought to be given for the Defendant; for this Licence by the Bailiff is void, for he cannot licence any to trespass upon his Masters Land: Wherefore the Plaintiff having confessed that he did it by the Bailiffs licence only, he therein acknowledged the Trespass, and it shall be adjudged against him: But all the Court resolved that Judgment shall be given for the Plaintiff; for although it is clear that a Bailiff cannot give licence to do a Trespass, as to cut down Trees, or can accept amends for Trespass, as it is in Pilkintons Case Co. 5. fol. 76. yet in as much as he may make a Lease at will, reserving Rent, because it is for his Masters profit, so he may give licence to go over his Masters Land for recompence, and that is good. Then here when it is pleaded that the Bailiff gave Licence, it shall be intended such a Licence with recompence, especially when it is found by Verdict that he gave him Licence, it shall be intended to be made in due manner, which being found, is a good Issue; and Judgment shall be accordingly; as in Debt upon a Bill, payment is no Plea; but if Issue be joyned thereupon, and found for the Plaintiff, it is good, and Judgment shall be for the Plaintiff, because the Issue is found that he did not pay; but if it be found for the Defendant, Coke said, that for as much as it was an ill Plea, no Judgment shall be for the Defendant: Wherefore here the Issue being found for the Plaintiff, Judgment shall be for him: Whereupon it was adjudged for the Plaintiff. (4)
1 Rol. 339.
Ant. 86.
Post. 435. 446.

Daniel *versus* Waddington, Hill. 12 Jac. Rot.

TRespass Upon Demurrer; the Case was; Two Joyntenants for life, the one makes a Lease for 60 years, if he and his companion live so long; afterwards he surrenders his Moiety, and takes back an estate, and dies: Whether this Lease for 60 years shall endure as long as his companion lives, or did determine by (5)
1 Rol. 831. 2.
2 Rol. 89.

by his death was the question : And it was argued by John More Serjeant, and Nicholas Hyde ; first, the limitation being for 60 years, if he and his Companion should live so long, admitting there had been no surrender, nor severance of the Joynture, whether the Lease by the death of any of them be determined, because it is a limitation upon the lives of two others. But the Court held, that be the limitations upon the lives of the Lessors, or of Strangers, all is one ; for it shall have continuance as long as any of them live. Secondly, the Joynture being severed by this Surrender, and taking back the Estate, whether yet the Lease shall continue during the life of his Companion, as it should have endured, if the Joynture had continued. As it is 3 Eliz. Dyer 187. & 37 Eliz. betwixt Harbin and Batten. *Quare*, for the Court did not deliver any opinion as to that point ; *sed adjournatur*. Afterwards in Hill. 13 Jac. it was moved again, and the Court held for the first point, that this Lease determined by the death of any of them ; for it is, *if they two live so long*. Secondly, that the Lease is clearly determined by the death of him that made it ; for it hath no continuance longer than the Joynture continues : Wherefore it was adjudged accordingly.

2 Rol. 89.
Ant. 91. 2.
Mo. 395.

1 Rol. 832.
Co. 5. 9. a.
Co. Lit. 219. b.
Co. 8. 145. b.
1 Rol. 831.

Williamson *versus* Hunt, Pasch. 13 Jac. Rot. 394.

(6)

DEbt upon an Obligation of 40 l. conditioned for the performance of certain articles and agreements betwixt them: The Articles were, that the Plaintiff should deliver to the Defendant 20 l. for the benefit of Constance his Daughter within a year ; and that the Defendant should pay annually to the Plaintiff after the receipt of the said 20 l. upon the second day of February, until the age of 18 years of the said Constance, such interest money as the said 20 l. should amount unto, according to the rate of 10 l. per 100 l. And further it was agreed, that if the said Constance should dye before she attained her age of 18 years, that then the Defendant should pay that 20 l. to the Plaintiff within six weeks after her decease. The Defendant pleaded performance of Covenants generally. The Plaintiff assigns for breach, that he had paid the 20 l. to the Defendant according to the Covenants, to the use of the said Constance, upon the 2 of Febr. 1609. And that upon the 27 Decemb. 10 Jac. the said Constance attained to the age of 18 years, and not before, and that the Defendant had not paid to the Plaintiff 40 s. for the Interest of the said 20 l. according to the said Articles, upon the second of Feb. 10. Jac. And hereupon the Defendant demurred ; and it was objected, that this is not any breach, because Usury is forbidden and unlawful ; then the breach cannot be assigned in omitting the doing of that which is unlawful to be done ; also it doth not appear what the Interest for 20 l. per ann. is : And although it be said, according to the rate of 10 l. per 100 l. ann. yet the Court shall not intend it to be so.

But.

But all the Court (Coke ablente) conceived, that it is a sufficient breach; for the payment of the Interest after the rate of 10 l. per 100 l. is not meerly against Law, but is tolerated; and when it is secundum ratam of 10 l. per 100 l. the Court knows well, that it is 40 s. for 20 l. for the year: Wherefore it was adjudged for the Plaintiff. Note, a Writ of Error was brought upon this Judgment; and the Error assigned was, because it is not shewn, that the 40 s. was after the rate of 10 l. per 100 l. for the year, nor what the interest of 20 l. amounted unto: *Sed non allocatur*; and the Judgment was affirmed. 1 Cr. j. 273.

VVithers *versus* Henley, Hill. 12 Jac. Rot.

TRESPASS, for that the 28 April 10 Jac. the Defendant took and imprisoned him, and detained him there for the space of a month: The Defendant justifies, because a Writ out of the Exchequer issued to take the Plaintiff and his Lands, until he satisfied the King, &c. And that such a Sheriff of Somersetshire took the Plaintiff in Execution; and that by vertue of a Latitat at the suit of one Robert Brown he took the Plaintiff, Et in exitu ab officio, left him in Prison to Robert Henly being Sheriff, his successor, &c. which is the same imprisonment: The Plaintiff replies quoad the Execution out of the Exchequer, that there was a Superfedeas out of the same Court delivered unto the Defendant, quod eum diliberaret si ea de causa & non alia fuit imprisonatus; and quoad his detainment upon the Latitat, he pleaded, that the said Rob. Brown, the Plaintiff in the said suit commanded the Sheriff to discharge him of his Action, before that his imprisonment, and made to the Sheriff a release of that suit; and yet notwithstanding the Defendant detained him: Upon this Replication the Defendant demurred; First, because it now appeareth by the Plaintiffs own shewing, that he was once lawfully imprisoned; and although a Superfedeas came after, admitting it were to be allowed by the Sheriff, yet it cannot make the Caption unlawful, but the Detention only. And it was also moved, That the Sheriff, although he hath a Superfedeas, yet he is not bound under pain of false Imprisonment to allow thereof, but he may return the Writ and the Prisoner with the Superfedeas, and the Court may discharge him: And therefore there is difference where the arrest is before the Superfedeas delivered, and where after; For in the last Case the arrest is unlawful, but not in the first. Vid. 2 H. 7. 19. 19 H. 6. 43. 9 Ed. 4. 3. But all the Court held, that the Superfed. was as good cause to discharge him, as the first process was to arrest him; and he ought to obey it at his peril: And in regard he hath not done it, he is chargeable with false Imprisonment; and that the detaining him in Prison is a new Caption, and he may well declare of Caption and Imprisonment. Secondly, it was (7)

3 Cr. 404.

objected, that the Sheriff is not bound to obey the Plaintiffs discharge upon the Latitat: for although a Sheriff upon a Plaintiffs command may let a Prisoner out of Execution, as 27 H. 8. 24. & 13 Ed. 3. Barr. 253. are, yet he is not bound to do it; for he peradventure doth not know, whether he be the same party who made the discharge, and brought the Writ: And it would be mischievous unto him to enforce him to take knowledge thereof; For if he be not the same person who made the discharge, he may be charged in Debt, or in an Action of the Case upon an Escape. But all the Court held that the Replication was well enough; for as well as the Sheriff may take knowledge of the party to arrest him at his Suit, so he is to take knowledge of the party to accept his discharge; and although in this Case the arrest was before his time, (viz. in the time of the former Sheriff) yet in the Laws intention it is all one, and he is bound to take Conusance of the Plaintiff as well in the one Case as in the other. And Doderidge said, if the Case had been, that he had not any Conusance of the Plaintiff, and therefore refused to discharge the Prisoner, he ought to have pleaded it: But now having demurred upon the Replication, he doth confess that the Plaintiff in the first Action did make the discharge: Wherefore upon the first argument at the Bar, it was adjudged for the Plaintiff.

King *versus* Sir Eusebie Andrews late Sheriff of the County of Northampt. Trin. 12 Jac. Rot. 1371.

(8)

Action upon the Case, for suffering one Burdet to escape, who was indebted unto him in 71 l. and arrested by vertue of a Latitat sued by him, intending upon his appearance and Bailgiven, to declare for that debt; where he was arrested by Sir John Iseham the former Sheriff, and left in Prison, the Defendant suffered him to go at large without finding sureties for his appearance: Upon Not guilty pleaded, all this matter was found by Verdict; That the said Sir John Iseham arrested him, and at the day, &c. returned Languidus, &c. and afterward, in exitu ab officio suo delivered him unto the Defendant as a Prisoner for this cause, and the Defendant suffered him to go at large. And if, &c. And without argument it was adjudged for the Plaintiff; for this permission to escape is just cause of Action; for he by this means is defrauded or delayed of his Action: And although it be found that the other Sheriff returned Languidus, &c. which is more than is in the first Declaration, yet that is not material to the Plaintiff, he remaining always in Prison, and that was to excuse his bringing the Prisoner at the day, Wherefore it was adjudged for the Plaintiff.

Gold

Gold *versus* Henry Death Executor of John Death.

DEbt upon an Obligation of 300 l. entred into by the Testator: The Condition whereof was, That whereas Anthony Death, son of the said John, was bound Apprentice to the Plaintiff for 8 years, if he during that Term, wasted, mispended, or consumed any the wares, goods or merchandise of the Plaintiffs, then if I. D. or his Executors within three months after due proof thereof made, either by the confession of the said Anth. Death, or otherwise howsoever, and notice thereof given the said I. D. or them who should render him recompence and satisfaction, make sufficient recompence and satisfaction of all such monies as shall be so duly proved to be consumed, &c. that then, &c. The Defendant pleaded, that the Plaintiff before the Writ brought, had not proved that the said Anth. Death had consumed, &c. the Plaintiff replies, that the said A. D. had within that term, viz. such a day consumed, &c. 400 l. of wares and merchandise of the Plaintiffs; and that the said A. D. such a day, year and place had by writing under his hand confessed that he had consumed the said 400 l. And that such a day, year and place he gave notice to the Defendant that the said A. D. had consumed, &c. that 400 l. and that he had confessed it under his hand, and shewed the confession to the Defendant; and that he within three months after had not made satisfaction; whereupon the Defendant demurred: And it was argued by Serjeant Hutton, that this Replication is not sufficient to entitle the Plaintiff to the Action; for the Defendant ought not to make satisfaction but within three months after notice of due proof, &c. And that proof ought to be by Action brought, and Tryal at the Common Law against the Apprentice, or by confession of the Apprentice upon an Action brought against him; for the Common Law esteems not of any proof, but by trial of a Jury; nor of any Confession, but of that which is upon Record: But against that was argued and resolved by the Court, that although generally proof is to be intended tryal by a Jury, which is the most notorious and absolute proof, as it is said, Co. l. 4. f. 74. & 5. 108. & l. 6. f. 20. 10 Ed. 4. 11. 7 R. 2 Lit. B. 241. yet proof may be in another manner, according to the intention of the parties, shewn by circumstances in writing, which when it is referred to a time after proof, it cannot be referred to Tryal for proof, which by the circumstance of time wherein it is to be made, or of the person before whom it is to be made, cannot be by Tryal: But it ought to be in such manner as it may; as if proof ought to be made to the Defendant within two days, that cannot be by Tryal, but it ought to be only by Witnesses who will affirm it before him. So if it were, that he prove it before I. S. that ought to be done by Witnesses produced afore him; which is proved by the said book of 10 Ed. 4. 11. And Doderidge relied upon the book

(9)
Hob. 92.
Moor 845.
2 Rol. 595.
3 Bull. 55.

Post. 488;

3 Cr. 723;

Ant. 188.
Perkins 8. 791.

Post. 488;

Moor 8.]

Hob. 92. 3. 217.
Perkins 791.
3 Cr. 470.

Hob. 93.

33. Ass. pl. 1. And the proof here being referred to the confession of the party, it is sufficient if he confesses it under his hand if it be true, but if it be not true it cannot bind the Defendant: But that he may well traverse it, that he did not know it to be true; but prima facie it is a good proof: Wherefore he having demurred thereupon, it is confessed that he made such proof, and that it is true: Wherefore the Replication was held good; and it was adjudged for the Plaintiff. *Note*, A Writ of Error was brought upon this Judgment in the Exchequer-Chamber, and the Error assigned in point of Law, and the point moved in the Kings Bench was first insisted upon, whether the proof were good: and all the Justices and Barons conceived it to be good enough: But then an Exception was taken to the Replication; that it is not alledged, that this notice was given to the Defendant after the death of the Testator; for if it were in his life time, it was to no purpose, and the strongest shall be taken against him who pleaded it: And all the Justices and Barons held this to be a material Exception, and an incurable fault; for it shall not be aided by any intendment: Wherefore for this cause the Judgment was reversed.

Prat. *versus* Stearn, Hill. 11 Jac. Rot. 1140.

(10)

3 Cr. 414.
Co. 5. 104. b.
Post. 491.

Co. 8. 41. a.

3 Cr. 414.

Replevin: Upon demurrer, the Case was, That a Freeholder erected a Dove-coat upon his Freehold, where there was not any before, and stored it with Pidgeons; this was presented at the Læet, and a pain assessed to amove it by such a time; and for not amoving it he was amerced, and for the amercement a Distress taken by the Lord of the Læet: And whether this Distress were well taken, was the question: First, whether the erecting of a Dove-coat by a Freeholder, and storing it with Doves, be a Nuisance and offence against Law. Secondly, whether the Lord may distrain without special custom for a pain or amercement in a Læet: Coke Chief Justice held, that it was a common Nuisance and inquirable in a Læet; but the other Justices seemed to doubt thereof. But for the second point they all resolved, that he might distrain, or have his Action of Debt for such a pain or amercement. But as to the matter they would not speak, because the presentment was not good; for that it is presented, that he erected a Dove-coat, and stored it with Pidgeons; but he doth not say in the Presentment, that it was *Ad nocumentum legiorum Domini Regis*; which ought to be in every Presentment: And although the party hath here averred, that it was *ad commune nocumentum*, yet that is not sufficient; for it ought to be in the Presentment, which is the charge; and this fault was held incurable: Wherefore it was adjudged for the Plaintiff.

Penning

Penning *versus* Judith Lady Plat Executrix of Sir Hugh Plat, Trin. 12 Jac. Rot. ultimo.

COvenant; for that the said Sir Hugh by Indenture reciting, (11)
Whereas he was possessed of the Lease of a Farm called New-Barns, for such a Term, he thereby Covenants, that the Plaintiff and his Wife shall enjoy it during the Term, without interruption of him or Judith his Wife; and alledgeth the breach, that although he performed the Covenants on his part, and entered, Sir Hugh Plat the Testator in his life time, such a day and year entered and ousted him, so as he hath not performed the Covenants, &c. The Defendant thereupon demurred. First Exception, for that the Indenture is alledged by Testatum existit; whereas it ought to be alledged, that by such an Indenture it is Covenanted: Sed non allocatur. Secondly, because he doth not alledge, Quod idem tamen le Testator, &c. so as it is not a full breach: Sed non allocatur; for although it be not so formal and precise, as where it is with an idem tamen, &c. yet for that it is licet he entered, the Testator expelled him, it is a direct affirmative, and well enough: And although the Covenant is, that the Plaintiff and his Feme shall enjoy it, and the expulsion is of the Plaintiff only, it is good enough; because the Baron hath the sole profits and possession: And although the Entry of the Testator is not alledged to be by title, so as he is merely a Tortfeasor, and that Trespass lyeth against him to recover damages, yet because it is expressed, that the Plaintiff and his Feme shall enjoy it without interruption of him or his Wife, so as she is in the express words of the Covenant, he shall have this Action, although he might have had his remedy by Action of Trespass. Vid. 26 Hen. 8. 3. Dy. 328. Therefore it was adjudged for the Plaintiff.

Post. 537.
1 Cr. 188.
3 Cr. 195.

Ant. 192.

Lamb *versus* Wiseman, in the Exchequer-Chamber,
Hill. 11 Jac. Rot. 1036.

Error of a Judgment in the Kings Bench, in Debt upon an Obligation of 200 l. the Error assigned, because the Ven. fac. being awarded to the Coroners, was returned by J. Barton and Tho. Roe Coroners; whereas at the time of the Writ awarded and returned, there were two other Coroners, viz. William Salter and Thomas Peach, and the return ought to have been in the name of the four Coroners; and In nullo est erratum was pleaded: this being the sole Error assigned, all the Justices of the Common Bench, and Barons of the Exchequer (besides Warborton) held, that it is not Error. First, because it ought to have been taken by way of challenge at the time of Tryal; and for as much as he hath not challenged it, he shall not now assign it for Error. Vid. 39 Hen. 6. 41. 30 Aff. Pl. 12. Secondly, admitting it were Error

(12)
2 Rol. 675.
Hob. 70.

Error assignable at the Common Law; yet now being after Verdict, it is aided by the Statute, which aids misreturns and insufficient returns, and this is but a misreturn: Wherefore the Judgment was affirmed.

Lady Plat *versus* Plummer in the Exchequer-Chamber.
Trin. 12 Jac. Rot. 558.

(13)
1 Rol. 333.
Hob. 70.

Error of a Judgment in the Kings Bench, in Debt upon an Obligation: The Error assigned was, because the Bill was filed 11 Febr. and the bail was filed 12 Febr. So as the Bill was before any bail; and it doth not appear that the Plaintiff was in custodia Mareschalli: yet for as much as the Bill, whensoever it were filed, hath relation to the first day of the Term, and the day and filing is not material; therefore this Error was disallowed, and rule give for assurance of the Judgment.

Sir James Sandelow and others *versus* Deverton in the Exchequer-Chamber, Hill. 11 Jac. Rot. 1377.

(14)
Hob. 72.
1 Rol. 754.

Sir James Sandelow and D. Tenant, and J. B. bring a Writ of Error against one Deverton, alias Forrest, of a Judgment given against Sir I. S. as Principal, and against D. Tenant, and I. B. as his Bail; and the Errors assigned as well in the principal Judgment, as in the Proceeding against the Bail: And upon the Scire fac. brought ad audiendum Errores, the Defendant pleaded in abatement of the Writ of Error, because the Principal and Bail cannot joyn in a Writ of Error; for the Proceedings and Judgments against them are several. And upon this demurrer, without argument, the Justices and Barons held, that this Writ of Error lies not; for they may not conjoyn in any such Writ: And they held, that the Bail upon the Judgment in the Scire fac. cannot have a Writ of Error; for it is out of the Statute of 27 Eliz. And it was much doubted whether a Writ of Error, Coram vobis residet, can be brought by the Principal: And it was afterwards resolved that it could not.

1 Cr. 300, 408.
575.
Ant. 171.
Ant. 135.
Post. 620.

Matthews and his Wife *versus* Thomas Coal, Thomas Doughty, and J. B. in the Exchequer-Chamber.

(15)

Trespas, for the Battery of the Feme: The Defendant T. C. pleaded generally Not guilty. T. D. pleaded that he is, & was at the time of the Trespass Constable of Haveril in Essex, and pleaded Not guilty. J. B. the third Defendant pleaded *de son assault demesne*, so three Issues being joyned, one Jury found all those Issues for the Plaintiffs, and assessed damages intirely to 40 l. and Judges given accordingly, and Error thereof brought in the Exchequer-Chamber, because they ought to have found several damages

images upon the feveral issues: Sed non allocatur; And the Judgment was affirmed. Vid. Co. 11. fol. 6. Ant. 118, 349.

The King against the Bishop of Norwich, Thomas Cole and Robert Saker, Pasch. 13 Jac. Rot. 21.

Quare impedit to present to the Vicarage of Haverell, and shews for Title, that Thomas Cole the Defendant was seised in fee of the Mannor of Haverell, to which the Advowson of the Vicarage was appertaining, and that the Church became void by a Simoniackal agreement made betwixt the said Robert Saker and the wife of the Patron, that the Patron should present him; and shews what the Simony was in specie, and that the Patron accordingly presented him; Wherefore by the Statute of 31 Eliz. (reciting it) the Church is void, and it belongs to the King to present, and the Defendant disturbed him: The Defendant pleaded, that N. Eliz. was seised in fee of the Rectory of Haverell appropriated, whereto the Advowson of the Vicarage appertained, and dyed seised, and that the Parsonage came to the King by descent; that the Church being void, the said Thomas Cole presented the Defendant by usurpation, and that the Defendant was admitted, instituted, and inducted; and afterwards the King presented the Defendant to that Advowson of the Vicarage, who was admitted, instituted, and inducted, and is Incumbent of the Kings presentation; and Craverfeth that the Advowson of the Vicarage was appertaining to the Mannor of Haverell: And hereupon the Kings Attorney demurred; And upon the first argument, without any difficulty, it was adjudged to be ill: For first, when one is admitted, instituted, and inducted by the presentation of a common person, although it were by usurpation upon the King, yet the King cannot present another, the Church being full, without removing the Incumbent by a Quare impedit, who is in de facto, although he be not in de jure; and the Church is full of him, until he be removed by a judicial means, or by resignation: And Coke said, it had been adjudged, that if a Church be void, and a stranger, without the privy of the after-Incumbent, procures the Patron to present, and gives unto him any Sum of money for his Presentation, although the after-Incumbent is not privy to that Simoniackal Contract, yet in as much as he comes in by a Simoniackal Presentation, the Church is void, and it belongeth to the King to present: So it is where the Incumbent makes a Simoniackal Contract with the Friend or Wife of the Patron, and the Patron knows not thereof, and the Incumbent is presented thereto by means of him who made this Simoniackal Contract; he is within the Statute of 31 Eliz. and the King may present: Also he said, that the Incumbent who is once presented, admitted, and instituted by a Simoniackal Contract, is a person disabled to enjoy that Benefice,

(16)
Hob. 75.
3 Inst. 153. 4.
2 Rol. 336, 349.
Co. Lit. 120,

1 Inst. 123. a
3 Inst. 153. a

Ant. 123.
2 Rol. 349.
Co. 6. 30. a
49. b
Co. Lit. 344. b

Post. 533

1 Cr. 331

Post. 534.
Hob. 75.
Co. Lit. 120.

3 Inst. 154.

5 Ed. 6. c. 16.

Co. Lit. 234. a

3 Inst. 154.

Hob. 75.

fice, although he obtains a presentation de novo from the King; for the Statute hath disabled him during his life to have it: And for proof thereof, Coke said, That it was resolved by the Lord Chancellor and himself upon conference with the other Justices, upon a question referred unto them by the King, That one Sir Robert Vernon being Cofferer to the King, contracted with Sir A. I. for money to assign his Office, and Sir A. I. obtained a grant thereof from the King; That by the Statute of 5 Ed. 6. he is a person disabled to take that Office, so as at no time during his life he can have it, although it becomes void by the death of any other Officer thereof, and a new grant be made unto him: And so he held it to be in the Case in question: Wherefore he and the other Justices conceived the Plea to be ill, and that Judgment should be entered for the King. Another Exception was taken to the Declaration, that the Title is to the Advowson of the Vicarage appertaining to the Mannor, which cannot be: For the Vicarage is extracted out of the Parsonage, and therefore the Advowson thereof appertaineth to the Parsonage, and cannot appertain to the Mannor: Sed non allocatur; for although the Advowson of the Vicarage usually appertains to the Parsonage, yet it is not of necessity and it may be appertaining to a Mannor. Vid. 17 Ed. 3. 51. 2 R. 3. Grant 89. And it was afterward adjudged for the King.

2 Rol. 336.

Robins versus Sanders, Pasch. 13 Jac. Rot. 21.

(17)

Ant. 6.

1 Cr. 442.

3 Cr. 145.

Error for that the Judgment was entered, Ideo concessum est per curiam quod querens recuperet, &c. where it should be consideratum est: And to make good this Entry, divers Presidents were cited in the Presidents of the Lord Coke; but it was answered, that it was a misprintion by the Printer, and that it is not so entered in the Roll; for it was alledged, that consideratum est is more effectual than concessum est: And Presidents are founded upon great reason, and are to be observed.

Bayly versus Merrel, Trin. 13 Jac.

(18)

1 Vul. 310.

Ro. Rep. 275.

Action upon the Case: Whereas 10 Decemb. 11 Jac. there was Communication betwixt the Plaintiff and Defendant, concerning the hiring the Plaintiff to carry for the Defendant with Horses and Wain a load of Wadder from Exhall in the County of Essex, unto Uppingham in the County of Rutland; and that then and there, to deceive him in the carriage thereof, the Defendant affirmed fraudulently, that the said load of Wadder was 800 pound weight; whereto he giving credit, undertook the charge of the said Wadder; and that the Defendant promised him to pay for every hundred weight 2 s. 8d. And he giving credit that the said Wadder was but 800 weight carried it according to the said agreement, and alledges in fact, that

that the said load of Hadder weighed much more than 800 weight, viz. 2200 weight; By reason whereof his horses drawing the said Wain with the load of Hadder, being laden with so great weight, were compelled ita vehementer laborare & trahere, that seven of his horses which drew the said Wain, ratione inde peribant, per quod, &c. The Defendant pleaded Not guilty, and found against him; and it was now moved in arrest of Judgment, that this Action lies not: For he being hired to carry by the hundred, it was his own folly to over-load his horses; and it was a matter which lay in his own view and Conscience; and if he doubted of the weight thereof, he might have weighed it, and was not bound to give Credence to anothers speech: And being his own negligence, he is without Remedy: as where one buys an horse upon warranting him to have both his Eyes, and he hath but one Eye, he is remedyless: For it is a thing which lies in his own Conscience, and such warranty or affirmation is not material, or to be regarded: But otherwise it is in Case where the matter is secret, and lies properly in the Conscience of him who warrants it, and cannot be known to him who buys, or makes the Contract; for the Law gives no remedy for voluntary negligence: And of that opinion was the whole Court, although it was said, that there was apparent fraud here in him who affirmed, &c. And peradventure the Plaintiff was a stranger there where he undertook the carriage, and had no weights to way it. But it was answered, that it was his gross negligence, that he would undertake a weight so far exceeding the affirmation, without causing it to be weighed: Wherefore the Judgment was stayed.

Ddd 2

Termino

Termino Hillarii,

Anno decimo tertio JACOBI Regis.
in Banco Regis.

Dighton and Holts Case.

(1)
2 Rol. 305.

Hob. 84.

3 Cr. 201.

4 Inst. 333.

3 Inst. 333.

2 H. 5. c. 3.
Ant. 37.

RObert Dighton and William Holt were committed by the High Commissioners, because they refused to take the Oath ex officio; whereupon an Habeas Corpus being awarded, it was returned, that they were committed; because they being convented for slanderous words against the Book of Common Prayer, and the Government of the Church; and being tendered the Oath to be examined upon those causes, they refused, and were therefore committed: And after three Terms deliberations, the Court now gave their resolutions, that they ought to be delivered: And Coke Chief Justice rendered the reasons; First, because this examination is made to make them accuse themselves of the breach of a penal Law, which is against Law; for they ought to proceed against them by Witnesses, and not enforce them to take an Oath to accuse themselves: And he thereupon cited two Presidents; the one in 10 Eliz. in the Lord Dyer not imprinted, where Lee an Attorney was convented before them, because he was present at Mass, and they would have examined him upon his Oath of these matters; and being imprisoned for refusing the Oath, this matter being returned upon an Habeas Corpus into the Common Bench, where he had his privilege, and was discharged. Another President he cited to be in 18 Eliz. where Rowland Hinde was convented before them upon pretence of Usury, and was offered to be examined upon his Oath, and refused, &c. and being committed for that cause, was discharged. Vid. Nat. Br. and Regist. Secondly, for that it appeared here upon examination, that they required a Copy of the Interrogatories, and were denied them; and that is within the Equity of the Statute of 2 H. 5. where the Copy of a Libel is denied: Wherefore they were bailed.

Sir Thomas Pickerings Case.

(2)
2 Rol. 39.
Hob. 90, 46.

IT was found by office after the death of Sir Sir John Pickering, that he and his Wife purchased the Mannor of *Weston*, in the County of *Herts.* held of the King by Knights Service in capite, to them and the Heirs of Sir John Pickering; and that he died seised thereof, and of two other Mannors holden in Socage; and that Thomas Pickering his Son and Heir was within the age of 21 years; and

and that his wife survived him, whereby during her life there could not be any wardship of the Land, but of the body only : Afterwards in 30 *Matino* Jac. the Lady *Pickering* died, in 30 *Junii* 10 Jac. *Tho. Pickering* being within age was made Knight, in 30 *Dec.* 10 Jac. he attained his age of 21 years, and tendred his Livery, and sued a special Livery within the time, wherein was a pardon of all Intrusions, Actions, Suits, Accounts, Executions and Demands, except Debts or money, by reason of any office or treasure of the Kings converted, or by reason of any Debt due by any Obligation or Recog. And notwithstanding the Auditor rated a charge upon him for the mean rates after the death of the Lady *Pickering*, until his age of 21 years; and Process was awarded thereupon, *Et ad computand. pro meliore valore*. And hereupon Sir *Tho. Pickering* came and shewed the day when he was made Knight, and the special Livery in discharge of the mean rates : *Et quoad* the other charge *ad computandum* he demurred, and hereupon a Case was made and referred to the Judges : First, whether he shall be charged for mean rates betwixt the death of the Lady *Pickering* and his being made Knight, there being no office found after the death of the said Lady. Secondly, whether he shall be charged with them betwixt the time of his Knighting, and attaining his full age. Thirdly, whether this charge *ad computandum pro meliore valore* (there being no Office nor former presidents to warrant it) be allowable : And these matters being debated by *Hobert* Chief Just. of the Common Bench, and *Tanfield* Chief Baron, they resolved, that this last charge is not warranted by the Law and being without former presidents, is not allowable : For the King by way of charge cannot impose a greater value than is found in the Office; But in his composition for committing the Land, he may impose what value he please; For it is his Bargain, and he may retain it in his hands, if he please, and the other who takes it at a greater value than is comprised in the Office, is at his election whether he will take it or not, But to lay a charge upon the Heir more than is in the Office, without another Office or survey to inhaunse it, is not allowable. Secondly, they resolved, that for the mean rates betwixt his being made Knight and coming of full age, he is not chargeable; for the King, by making him Knight, hath thereby dispensed with his minority, and he is in Law accounted, as if *de facto* he were of full age. Thirdly, they resolved, that he shall be charged with the mean rates until he were made Knight, although there be not any Office found after the Ladies death, which if it had been found, was clear, that he should be charged, for then the King had been in possession of the Land, and entitled to the profits, in which Case a special livery would never have discharged them; for that doth not discharge the possession, nor give that which is in possession, no more than a release of a Common person can give a thing in possession : and the common experience of the Court is, that a special Livery shall be construed according to the intent, to discharge that which is not in possession, but is concealed, but not to discharge any thing which

Hob. 91.

ABT. 156.
Co. 6. 74. #

Hob. 91.

is in possession: But here the doubt is, because there is not any Office found after the death of the Lady, which entitles the King to the Land; for the other Office after the death of Sir *John Pickering* entitles him but to the body: But because there was an Office before finding the Estate, by reason whereof he was in Ward for his body, and for the Reversion; and it is an usual Course in the Court not to have an Office after the death of a Tenant for life, when there was an Office before finding the Inheritance: But all shall come in by the *Feodaries* Certificate, which is the Information to the Court; and it is the usual Course for ease to the Subjects to accept of such Certificates, and not to enforce the finding several Offices, it was resolved that he should be charged. *Vid. Dy.* 249, 284. *Co.* 6. 74. *Co.* 8. 170, & 173.

Wood *versus* Germans, Trin. 13 Jac. Rot. 1064. Norf.

(3)

Co. 7. 23. a.
Co. 4. 120. b.

Ejectione firmæ: Upon a special Verdict, The Case was, Tenant in Fee of an Acre, and Lessee for 21 years of another Acre, lets both of them for 10 years, rendering Rent, with a proviso, that if the Rent be behind for 28 days, that he and his Heirs might restrain; and if there be not a sufficient distress upon the Land, that they may re-enter: The Lessor dies, and the Reversion of the Inheritance descends to his Heir, and the Reversion of the Lease came to his Executors. Afterward the Rent being due, and arrear for 28 days, the Heir demanded the portion of Rent according to the value of the Land of Inheritance; and it being not paid, nor sufficient distress upon the Land, he entered, and let to the Plaintiff: And whether his Entry was lawful or not, was the question. First, whether these words, that he might restrain, be apt words by any construction to signify the intent of the Lessor, that if the Rent be behind, it should be lawful for him to distrain. Secondly, whether (this Reversion being so divided) the Rent also be divided, and is apportionable: And if the Condition be divided, whether the Heir may demand part of the Rent, and for non-payment re-enter. Coke held for the first point, that Restrain was as much as to say Distrain, and it shall be accepted to be of the same sense, as in 6 Ed. 2. Recipere ter. or that terra redibit pro remanebit. For the second point no opinion was delivered: Sed adjournatur.

Sir Baptist Hicks *versus* Goats, Mich. 11 Jac.

Rot. 1236. in C. B.

(4)
1 Rot. 462.
2 Rot. 703.

Error of a Judgment in the Common Bench, in a Writ of Covenant, wherein Sir Baptist Hicks had Judgment to recover 400l. The Error was assigned in point of Judgment, because the Plaintiff counts upon a Writ of Covenant, wherein was covenanted inter alia, Whereas the Plaintiff had bought of Henry Fleetwood a Wood called Weston Park, esteemed to be

be 300 Acres, after the estimation of eighteen foot and a half to the pole, at the rate of 100 l. for every acre, and had paid 2500. That the said Sir Baptiste Hicks and Henry Fleetwood should appoint two measurers, the one at the election of H. Fl. the other at the election of Sir B. H. to measure it, before the 31 of January following; and if there appeared to be more acres at the said measuring then the 2500 l. amounted unto, that Sir Baptiste Hicks should pay as much as should be more, before the end of February; and if the acres did not amount to so much as he had payed, that then Henry Fleetwood and Goates should pay as much as should be wanting, before the 31 of May following: And he allegeth in fact, that he nominated such a measurer; and that Henry Fleetwood would not appoint any before the 31 of January. That the said measurer justly measured it, and there were wanting 70 acres which amounted to 750 l. And that he being required upon the tenth of December 10 Jacobi to pay it, had not paid it. The Defendant takes Issue, that there did not want any acres to amount to the said sum of 2500 l. and it was found against him, and Damages given to 400 l. and Judgment accordingly. The first Error assigned was, because it is not alledged, that there wanted so much; but that it appeared by the measuring, that there wanted so much, and it might be falsely measured: But upon the perusal of the Record, it was held to be well enough; for it was alledged, that it was justly measured, and that there wanted seventy acres which is not referred to the measuring, (which peradventure might be false;) but it is expressly averred, that there wanted so much. Secondly, it was much insisted upon, that notice ought to have been given to Goates that so much was wanting, because he was a stranger to the measuring, and the notice ought to have been before the day of payment. Vid. 31 Maii 8 Jac. And there is not any request herein alledged until Decemb. 10 Jac. which is long after the day of payment was past: So he takes advantage of a Covenant broken, where the Defendant had not any notice given him to perform it: Sed non allocatur; for he being privy to the Covenant, ought to take notice of the Ad-measurement as well as the Plaintiff, and might have been present at the measuring: And although Henry Fleetwood (and not Goats) was to appoint the measurer, and did not do it, it was his default; and they both being parties to the Covenant, the Defendant is as well to take notice thereof as the other: Also, in point of Covenant, notice is not to be given as strictly, as it is upon an Obligation, which is in point of Forfeiture. Vid. Coke lib. 8. fol. 892. b. Frances Case 10 Ed. 4. 14. & 24. Afterwards, notwithstanding these Exceptions, Rule was given that Judgment should be affirmed.

Ant. 297.
Post. 472.
Hob. 14.

Barbara Herbert *versus* Thomas Binion,
Trin 10 Jac. Rot.

(5)
Moor 847.

Moor 487.

Ant. 117.
3 Cr. 567.

Infra 393.

ERror, to reverse a Fine in the County of Montgomery by her and Richard Herbert her husband: The first Error assigned was, for that the Writ of Dedimus potestatem bare Teste before the Writ of Covenant, and had a Scire fac. to warn the Heir and Certenant; and Thomas Binion was returned to be warned as Heir and Certenant; and he appeared and pleaded, that William Binion the Conulee, his father died seised, which descended to him as his Heir, and that he is Certenant and within age, and prays, *Que parol demurrera* the Plaintiff counterpleaded the age, shewing that she was entitled to have Dower before the Fine levied, and now is barred of her Dower by this Fine; wherefore she sues to be restored to have her Writ of Dower: And it was thereupon demurred, and argued oftentimes at the Bar, and afterwards very solemnly at the Bench, whether it were a good Counterplea to out him of his age; And Coke Chief Justice, Croke and Houghton argued, that it was no Counterplea for her to out him of his age; for it is a rule, The Heir being within age, and in by descent, (so as he is Heir and Certenant) shall have his age in a Writ of Error, as 47 E. 3. 7. 9 H. 6. 46. & Co. l. 6. f. 4. b. Markal's Case: And although it were objected, that in Dower age is not allowable, as 5 E. 3. 4. 5 H. 5. 13. 12 E. 4. 17. 4 H. 7. 1. 17 E. 3. 53. & 44 E. 3. 23. For the mischief when the claiming but an Estate for life, may die and lose that Estate; which was the reason in 35 Eliz. betwixt Williams and Williams, That an Infant suffering a Recovery by default in Dower, he shall not avoid it by Error for this cause; for then she never should recover: And so it was objected, that in a receipt or Attaint an Infant shall not have his age, for doubt of the death of the Jurors in the one Case, and of the Summoners and Viewers in the other: And therefore where there is such a mischief, the age shall not be allowed. And here it was objected, That it is now confessed by the demurrer, that she had Title of Dower, if this fine were avoided, yet they held, that in as much as the rule of Law is, That an Infant by intendment hath no Consuance to plead in defence of his Title, and he might have divers Pleas to avoid that Writ of Error; and she herself by her fine hath given from her self her right of Dower by her own act, as long as the Fine stands unreversed: Therefore the Law shall favour the Infant rather than the *Feme* to reverse his own Fine: And although she now pretends that she claims but Dower, yet if the Fine were reversed, she might claim another Title, which peradventure might reach to the inheritance: And this pleading here doth not Estop her, and by this means the Infant should be disinherited, where peradventure

ture if he were of full age he had a Release, or other matter to bar the Writ of Error: But if the *Feme* be barred in Dower by Judgment in a Writ of Dower, and brings Error, there the Heir shall not have his age: Because it appears by the Writ it self, that she demands Dower only, and sued to have it. So 44 E. 3. 43. If a *Feme* being to be endowed loseth by default in a *Præcipe*, and brings a *Quod ei deſorciat*, the Tenant shall not have his age; because the Title of the *Feme* appears, and she hath not done any Act to foreclose her self; but here she hath committed an Act to bar her self of her Dower: And although she saith she claims only Title of Dower, that cannot be put in Issue betwixt them; for an intent to have Title of Action is not issuable: And Coke cited, that in our ancient Books, as *Fleta* cap. 6. *Bract.* 152. *Brit.* 327. If a *Feme* after the death of her Husband suffers one to continue a year and a day, and he dies seised, his Heir within age, the *Feme* shall not demand Dower during the nonage of such an Heir: But the *parol* shall demur, because it was her folly to suffer him quietly to enjoy it without Suit; a *multo fortiore*, here where he is in by her fine, and a dying seised: Also a fine is as an assurance, and is to be favoured as much as may be, by any means; and therefore although Dower is to be favoured, yet the Law will not give her any favour to avoid her own assurance: Also Counterplea of age shall not be; but where it appears that he is not Heir, as a Bastard, or one who is not in as Heir, but by purchase, or in case of inevitable necessity: Doderidge argued strongly to the contrary, and said, That there was an Infant, and a *Feme* who demanded Dower; that both were to be respected, and are to be favoured, and the safest way to avoid Error, was to grant age: But he conceived, that it was not the true way, and therefore he held, that the age was not grantable; for as in Dower it is not grantable, no more is it allowable in this Action, which is to bring her to the means to have Dower, 43 *Ass.* 22. in petition it is not allowable: The pretence that he should have his age, is, because he might have a Release to plead: But that cannot be here, because she was a *Feme* covert (But note, she might have made a Release after the death of her *Baron*) which is the reason that in a *Scire fac.* to execute a Judgment, the Heir shall not have his age: For the Law adjudgeth, that he cannot have title, but that he is bound by the Judgment; as 18 E. 3. 34. & 22. E. 3. And here-
 lied upon the Cases of Attaint, 40 *Ass.* 27. 47 E. 3. 8. and of De-
 ceit: Wherefore he held, that it was not grantable: But not-
 withstanding it was adjudged, that the *parol* demurrera.

1 Cr. 270.

Supra 392²

Sir Henry Slingsby *versus* John Lambert and his Wife
Executrix of John Shilleto, Mich. 12 Jac. Rot.

(6)

Ant. 4.

Ant. 15;
1 Cr. 294.

ERror of a Judgment in Debt in the Common Bench; because the then Plaintiffs as Executrix brought Debt against the Defendant as Sheriff of York, for the escape of one George Brown, against whom they recovered a Debt of 82 l. as Administratrix of John Shilleto; and that he being in Execution, the Defendant suffered him to escape, reciting all the Record in certain; and the Error assigned, for that the first recovery was as Administratrix of l. s. and the Debt upon the escape is as Executrix to J. Shilleto, which cannot be, that one should die Intestate and have an Executor, and the Debt upon the escape ought always to pursue the first Action: And this Action being brought as Executrix, disaffirms the first Sute, which supposeth a dying Intestate; and if an Executor brings an Action, and recovers, and dies Intestate, the Administrator of the first man may not sue Execution by Scire fac. For there is not any pivity betwixt them; as 26 H. 8. 7. & Co. lib. 5. fol. 9. b. & Co. lib. 1. 96. a. Shellyes Case. And if one recover as Administrator, where he is Executor, the party against whom the Recovery is, shall have an Audita Querela, supposing he had no right to recover, as 2 R. 3. 8. A multo fortiore, where it appears by their own shewing that there is an Executor, he cannot found an Action upon that which he did as Administrator; and although one same person brings this Action as Executrix, who first recovered as Administratrix, and so quasi a pivity therein, which is the principal doubt of this Case, as Doderidge said, (for if he had made a release he might have barred that Action, or if the money had been levied he might well have retained it) yet because it appears, that he ought not to have an Action in this manner, all the Court held, that the Recovery was erroneous: Wherefore the Judgment was reversed. Vid. Co. 5. 33. a.

Tho. Blanford *versus* Laurence Blanford, Trin.

8 Jac. Rot. 1371.

(7)

Moor 846.

TRespals: Upon a special Verdict, the Case was, Tho. Blanford the Grandfather being tenant for 32 years of the Lands in question, and having Issue two Sons, Thomas Father to the Plaintiff, and Laurence the Defendant, devised his term to his Feme for her life; And after her decease to Tho. and Laurence his Sons, and if they have no Sons, equally and joyntly together: But if it please God to bestow on them both Men-children, then my will is, it shall be reserved and put out to the use and profit of both their Sons joyntly together, or to one of them, if they both have not Men-children: But if it fall out they have no Issue male, then my Will

Will is, after the decease of my son, it shall be to two of *Henry Blandfords* Children: And he made his Wife Executrix, and died; she assented to the Legacy, and died; Thomas and Laurence enter, having then no Children; Thomas then years after had a Son (now Plaintiff) who entered, and ousted the Defendant; he re-entered, Et si supra, &c. And after argument at the Bar, it was argued at the Bench; and the question was about the Exposition of this Will, viz. Thomas and Laurence having no Sons at the time of the death of the *Feme*, and the one of them having a Son after, whether he shall oust his Uncle presently, or shall expect until his Uncle and Father be dead: And it was resolved by Coke, Doderidge and Houghton, that the Son born shall have it presently; and that his intention in the Will was, that his two Sons, Thomas and Laurence should not have it if they had a Son; and his care was for his Grand-children what should become of them, rather than for his own Children.

Moort 846.

Ecc2

Termino

Termino Paschæ,

Anno decimo quarto JACOBI Regis.
in Banco Regis.

Fowks *versus* Child.

- (1) **E**jectione firmæ against William Child: After Verdict, it was moved in arrest of Judgment, that the Distringas was inter Fowks & Johan. Child; and upon Examination it appeared that the Writ was so; but the pannel annexed was entituled, Nomina juratorum inter Rich. Fowks & Willelmum Child, and the Jurors were the same persons who were returned upon the Ven. fac. And the truth was, that there were two Records of Nisi prius, and two Distringasses, the one betwixt Rich. Fowks and William Child, and the other betwixt Rich. Fowks and John Child; and by the Sheriffs misprision that Pannel which was betwixt Rich. Fowks and William Child, was annexed to the Writ of Distringas betwixt Rich. Fowks and John Child; and this only was tryed, and not the other Issue: The question was, whether it might be amended or aided by the Statute of Jeofails: And it was resolved that it was aided by the said Statute; and it is as if there had not been any Writ at all; wherefore it was adjudged for the Plaintiff.

1 Cr. 563.

1 Cr. 32.

Co. 3. 2. b.

5. 43. a.

Ant. 14. 354.

Post. 457.

George Therne *versus* John Fuller, Mich. 12 Jac. Rot.

- (2) **E**rror in an Assumpsit, whereas Tho. Fuller the Defendants Brother was indebted unto him 32 l. which being not paid, he for the recovery of the said Debt, extra curiam Dom. Reg. ad placita coram ipso Rege tenend. assignat. procured an Alias capias to arrest him, returnable quinden. Hill. to answer him in placito præd. And that he delivered that Writ to the Sheriff of Buck. who by vertue thereof, 24 Jan. the same year arrested him. That the Defendant postea, scilicet 12 Apr. 12 Jac. in consideration that the Plaintiff at the Defendants request ad tunc & ibidem would assent, and be content to desist from further prosecution of the said Suit against the said Thomas Fuller so begun, and would remit unto

unto him his costs, the said John Fuller assumed to pay that Sum at the Feast of St. Michael, or then to give him security to pay the said Debt unto him at the end of six months; and alledged in fact, that he did forbear to prosecute, and that he had not paid it, nor given him any security: After Verdict and Judgment given for the Plaintiff, and now Error brought, the first Error assigned, was, because he doth not alledge how and in what manner he became indebted: Sed non allocatur; for although it be true (as all the Justices here agreed) that an Assumpsit lies not upon a general allegation against the party, quod indebitatus assumpsit, without shewing how he was indebted, viz. for Ware sold, or money lent, or such good cause: Yet for as much as the Debt is here collaterally due by another, and the Consideration is the staying the Suit after the arrest, it is good enough. The second Error, because it is alledged, that he prosecutus fuit extra curiam Domini Regis ad placita, &c. Where (as was alledged) there was not any such Court by that addition; but it ought to have been, extra curiam Domini Regis coram ipso Rege tenend. for the other addition is only for the Judges of the Court, that they are assigned, &c. Sed non allocatur; for it is all one in substance. Thirdly, because the Consideration, quod assensit & contentus fuit to forbear to prosecute, is no sufficient consideration; for he may forbear one day and prosecute again the day following: Sed non allocatur; for it is a promise for an absolute forbearance of the Prosecution, for that is implied. Fourthly, that the promise is in April, and the arrest being in January before, it doth not appear that the Writ was returned, nor that it was continued, nor what became of it, or that it had any Essence, and it cannot be said to be a suit commenced: Sed non allocatur; for being alledged that the Writ was sued out, and that he was thereupon arrested, it is a sufficient commencing thereof, the staying of which is a sufficient ground for this Action. Wherefore notwithstanding these Errors assigned upon the first motion of them, the Judgment was affirmed.

Ant. 297.

Hob. 18.

Ant. 47.

Post. 548, 594.

Hob. 216.

Ant. 342.

Hob. 216.

Post. 683.

Ralph Smead *versus* Badley, Pasch. 14 Jac. Rot.

Action upon the Case, for standing his Title; and declares, Whereas William Smead his Brother was seised in Fee of the Mannor of Cole-Norton, and died seised, without Issue, which descended unto him as Brother and Heir; and that he entred, and had a purpose and intent to assure part upon his son for his Advancement, and to make Leases of part: That the Defendant, to frustrate his intent, used these words, That the Plaintiff hath no more Right to the Mannor of Cole-Norton than a stranger; by reason of which speeches he could not make any Lease or other assurance for his Son. The Defendant pleaded Not guilty, and it was found against him, and moved in arrest of Judgment.

(3)

Yelv. 89.

1 Cr. 140, 141.
Post. 485.

Judgment, that this Declaration was not good, because he doth not shew any sufficient cause of loss; for it is not shewn, that he was in communication to make Leases or Assurances for his Son, but only that he had an intent, which may be secret, and not known to any; and for that cause the Court held it to be ill, and Judgment was given for the Defendant, notwithstanding the Presidents in the new Book of Entries, fol. 55.

Whitchcot *versus* Fox.(4)
1 Rol. 408, 422:1 Rol. 408.
Ant. 92.
Post. 522.Co. 4. 119. b
1 Rol. 422.

Co. 4. 18. b

Ant. 334.

REplevin; Upon a Demurrer, the Case was such; George Fox Lessee for 99 years by Indenture, rendering Rent, Covenants by the same Indenture, That he will not alien nor assign his Term, or any part thereof to any other, but to his Wife during her life, and the residue of the Term to his Children, or one of his youngest Brethren, upon pain of Forfeiture of his Lease: The Lessee having a Wife assigns his Term to Edward Fox his Brother, who assigned it to Thomas Hopton; Hopton enters and makes Lucy his Wife his Executrix; who after payed the Rent to the said Lessor as Executrix to her Husband Assignee of the said George Fox, who accepted thereof, and afterwards entred for the Forfeiture: And if his Entry were congeable was the question. First, it was doubted, whether this Covenant that he shall not alien, &c. under pain of Forfeiture, being only by the Lessee, and not by Proviso, be a Condition to defeat the Estate: And it was resolved (without hearing arguments) that it was; for being by Indenture, they are the words of both parties, and are sufficient to determine the Lease. Plow. 142. 3 Ed. 6. Secondly, whether the alienation to the Brother in the life of the *Feme*, and this alienation by the Brother to Hopton, be a breach of the Condition: And quoad the first point, It was objected, that the *Baron* might not alien to the *Feme*; therefore the Condition in that point is void, and thereby liberty is given to alien to his Brother; and when he hath aliened to his Brother, the Condition is dispensed with, and the Brother may alien to whom he please: And of that opinion was all the Court, quoad the second part of that question; but for the first part they doubted. Thirdly, admitting it to be a breach of the Condition, whether this acceptance of the Rent by the hand of the Executrix of the Assignee shall bar him of his Entry, because it is not alledged that he had notice of the assignment at the time of the acceptance; but that he sciens that she was Executrix of the Assignee, accepted of that Rent: And sciens is not traversable, but he ought to have alledged by matter in fact, that he had notice, which might have been traversed: But all the Court held, that this acceptance shall bar him of his Entry; for where the Rent is accepted by his own hands, it shall be intended that he had notice she was to pay it, and the allegation by way of Sciens is sufficient; and if he had not notice, the Lessor ought to shew it on his part:

part: Wherefore it was adjudged accordingly for the Plaintiff.

Loyd versus Cook.

ERROR in the Exchequer Chamber, of a Judgment given in the Kings Bench, in an Action for these words, Thou art a Witch, and that I will prove; I have seen thy Imps or Spirits in the night, and thou didst unbewitch my Child: Judgment being given that these words were actionable, it was now assigned for Error, that it lies not: And of that opinion were all the Justices and Barons; for to say, Thou art a Witch, hath been oftentimes adjudged not to be actionable; and the addition, I have seen thy Imps or Spirits, is but matter of fancy, and not tryable whether it be true, and therefore no cause of slander: Wherefore the Judgment was reversed.

(5)
1 Rol. 45.

Post. 531, 600.
Hob. 129.
1 Cr. 324.
Ant. 150.

Sir John Bret *versus* John Cumberland, Executor of William Cumberland, Trin. 13 Jac. Rot. 1500.

COVENANT, for that Queen Eliz. by her Patent let an house to the said William Cumberland, wherein were these words; and the said Lessee his Executors and assigns reparabant domum prædictam, and shall leave the said house so repaired, &c. The Queen afterwards granted the Reversion to the Plaintiff, and to his Feme, and to the Heir of the Baron in Fee; and for not repairing, the Plaintiff brings an Action of Covenant: Upon this Declaration the Defendant demurred; First, because the Action was brought by the Baron sole, where by his own shewing the Feme hath an Estate therein as well as the Baron. Secondly, because they be not the words of Covenant of the Lessee, nor is it the Deed of the Lessee: But the Court without argument resolved for the Plaintiff; for the action being personal, and damages only to be recovered, the Baron may have the Action solely, or join the Feme with him if they please. Thirdly, they held, that these words in the Queens Patent amount to a Covenant on the part of the Lessee; and he accepting the Lease is bound by that Covenant: Wherefore it was adjudged for the Plaintiff.

(6)
1 Rol. 518.

1 Cr. 505.

Post. 522.

Post. 521.

Tydcot versus Westcomb.

AVENIRE faciās was awarded from T. and not de vicineto de T. and for this cause an Exception taken, and resolved to be ill, and not amendable.

(7)
Post. 493.

Berry versus Penring.

DEbt upon an Obligation; The Condition was, to stand to the arbitrement and order of four such persons, naming their

(8)
1 Rol. 440.

1 Rol. 440.

Ant. 278.

Ant. 278.

their names of all actions, &c. So as the same award be made and delivered up in writing under the Hands and Seals of the four or any three of them: The Defendant pleaded, nullum fecerunt arbitrium: The Plaintiff shews, that three of them made an arbitrement under their Hands and Seals, and shews what, and assigns for breach, the not paying of a certain Sum of money, which they arbitrated to be paid: Whereupon the Defendant demurred, pretending this arbitrement to be void, because it was not made by all the four Arbitrators; for the arbitrativè authority is given to them all four, and not unto three of them: And the words, so as the same be made and delivered under the Hands and Seals of them, or any three of them, doth not alter the authority, but that they all ought to make it; nor is it good if it be under the Seals of three of them. And to that opinion at the first the Court inclined; but after several arguments at the Bar, they all seriatim delivered their opinions, that the Arbitrement was good, for every part of the Condition being weighed, the intent appears, that it should be sufficient if three of them made it: And although the words at the first are to them four jointly, yet that is sufficiently disjoyned afterward by the words, so as the same be made and delivered by any three of them; which expound, that the submission is to be the act of four or three of them; and an authority may be well divided, but an Interest cannot. And they much relied upon a former Judgment in this Court, betwixt Sallows and Carling: Whereupon it was adjudged for the Plaintiff. But afterwards a Writ of Error was brought upon this Judgment in the Exchequer-Chamber, and the Error assigned in matter of Law, for the cause before mentioned: But all the Justices and Barons agreed that the Arbitrement was good enough; for the so as explains sufficiently the submission to all or to three of them, and that disjoyns all the authority. Another Exception was taken in the Arbitrement, that it was not final; for they arbitrate that all Suits and Actions shall cease, and all matters shall be determined, except concerning such a Bond which was awarded to stand in his force; so it was objected, that they had not made an end of all matters, and therefore the arbitrement not good. But all the Justices and Barons held it to be well enough; for they made an award concerning that, viz. that it should stand in force, and should be satisfied, which is a sufficient declaration of their purpose concerning all Controversies; and no disclaimer to meddle with any: Wherefore the Judgment was affirmed.

Cooper *versus* Franklin & Walter, Trin. 12 Jac. rot. 94 r.

(9)
Co. Lit. 19. b.
2 Rol. 780.

E Jectione firmæ: Upon a special Verdict for Lands in Phelphan: The Case was; J. W. was seised of those Lands in Fee, and made a Feoffment of them to Thomas Walter, Habendum to him and

and his Heirs of his body, to the use of him and his Heirs and Assigns for ever. Whether Thomas Walter had an Estate in Fee Tail only, or a Fee determinable upon the Estate Tail, was the question. First, whether an use may be limited upon an Estate tail at the Common Law, or at this day after the Statute of 27 H. 8. of Uses. Secondly, whether this limitation of Uses to him and his Heirs, shall not be intended the same Uses, being to the feoffor himself and to the same Heirs, as it is in the Habendum: Quare, quia non adjudicatur: But the opinion of the Court upon the argument, inclined, that he was Tenant in Tail, and the limitation of the use out of the Tail is void as well after the Statute as before; For the Statute never intended to execute any use, but that which may be lawfully compelled to be executed before the Statute: But this cannot be of an Estate Tail; for the Chancery could not compel him at the Common Law to execute the Estate; And so the Statute doth not execute it at this day. Vide 27 H. 8. 2. 24 H. 8. 62. Feoffments al uses 41. Co. lib. 2. fol. 78. in the Lord Cromwells Case: Et adjournatur.

1 Cr. 245.

Co. Lib. 19. b.
2 Rol. 780.

Harison *versus* Hucksley, Wymer & alios,
Hill. 12 Jac. Rot.

Scire facias against them as Manucaptors for Will. Hucksley, who was condemned in Debt and in Execution, and brought a Writ of Error, wherein the Defendants were Manucaptors, that he should prosecute the Writ of Error cum effectu; And if the Judgment were affirmed, that they should satisfy the debt, if the said Will. Hucksley did not satisfy: The Judgment being affirmed, and Scir. fac. brought against the Manucaptors, they pleaded a release made to the Principal, and bail of all Debts, Judgments, and Executions betwixt and after the first Judgment, and the Writ of Error brought, and Bail entered, and before affirmation of the Judgment: And whether that were a Bar in this Suit was demurred; And it was objected, that the Principal being bailed, he can never be in Execution again for that debt; so the release to him cannot be good: And to the Bail it cannot be good; For before the Judgment affirmed there is not any cause of Action against them: And therefore it was compared to Hoe and Marshals Case, Co. 5. fol. 70. where a Release to one who was Bail in the Kings Bench before the Judgment was adjudged void; for then at the time of release there was not any just cause of Action, nor was there any duty due by the Bail, until the Principal is condemned, and made default of payment. But in that case, the opinion of the Court was against the Plaintiff; For the principal party, notwithstanding he be out of Prison, yet may well satisfy the condemnation, and the Surety is not liable to satisfy, but in his default of payment; and therefore a release unto him is good enough: As also the case is, it is a good release to the Bail; For the Sum which they are to satisfy is certain by the first Judgment;

(10)

1 Rol. 335.

Infra 402.

Ante 171.

Ante 337.

Post. 450.

ment, and therefore not like to Hoes Case : And sozasmuch as they are liable to satisfie it, the release to them is good : Wherefore, &c. Sed adjournantur.

Austen *versus* Richard Monk and Samuel Chew;
Pasch. 14 Jac. Rot. 544.

(11)

SCire facias upon a Recognisance of 400 l. the condittion whereof was ; whereas the Plaintiff had recovered against Tho. Brown in Debt 200 l. and 8 l. 14 s. for costs ; and the said Tho. Brown had thereupon brought a Writ of Error, that if he prosecuted it with effect, or if it were affirmed, and that the Reconusee paid the condemnation with the costs which should be adjudged for the delay of execution ; That then, &c. The Defendant pleaded, that such a day after the Recognisance, the said Thomas Brown, before the Judgment affirmed, rendred himself to the Marshalsey to be chargeable for the Execution, and to discharge his sureties, and there yet remains : And it was thereupon demurred, and without argument adjudged for the Plaintiff, that it is not any plea ; For this manucaption is not to render his body, but to pay the debt adjudged, which is grounded upon the Statute of 3 Jac. cap. 8. That for the avoiding delays in Executions the party who sueth a Writ of Error in debt shall pay the debt, or find sureties to pay the debt ; otherwise there shall not be any stay of Execution : Wherefore it is not sufficient to render the body, but he ought to pay the debt, or his Sureties for him ; and not to let him to bail, and to render himself when he will.

Supra 401.

Termino

Termino Trinitatis,

Anno decimo quarto JACOBI Regis
in Banco Regis:

Frofel *versus* Welsh, Hill. 13 Jac. Rot. 854.

Ejectione firmæ; for Lands in Mansel, of a Lease by Henry Herring: Upon Not guilty, a special verdict was found, that the land in question was Coppyhold land, parcel of the Mannor of Mansel, demisable in fee; That the custom of the Mannor is, that a Coppyholder in fee may surrender out of Court into the hands of two other Coppyholders of the said Mannor to the use of another in fee, which ought to be presented at the next Court for that Mannor, otherwise it shall be void; That Thomas Herring, Father of the Lessor, whose Heir he is, was Coppyholder in fee of that Land, and surrendered out of Court into the hands of H.B. and W. J. two Coppyholders of the Mannor to the use of Robert Whittington in fee; That the said R. W. entred and payed the Rent to the Lord; that the said Th. Herring who surrendered, died; and that the said H. B. and W. J. who took the surrender are dead, and that no Court was held there during that time; That the Lessor being Heir to him who made the surrender, entred, and let to the Plaintiff; And the Defendant by the command of the said R. W. to whose use the surrender was made, ousted him: Et si super totam materiam, &c. And upon this verdict, after argument at the Bar, all the Court delivered their opinion, that the Plaintiff should recover; For they held, that by the surrender into the hands of two Tenants, nothing passed until it was presented in Court, and that in the interim the interest remained to him who made the surrender, which interest descended to the heir who is Lessor to the Plaintiff, and that he well might enter and make that Lease (being but for a year) without the Lords License, or without shewing any special custom: And the acceptance of the Rent by the hands of *Cestuy que use*, gives not any interest unto him, until this surrender be presented in Court; For the custom is strict, which ought to be observed: But they held, that it was not of necessity, that the parties who took the surrender should present it; and although they be dead, and the party who made it is dead; yet (as the custom is found) if it be presented by any other Coppyholder when the next Court is held, it is well enough; and he may thereupon be well admitted. V. Co. 4. f. 29. b. Buntings case so resolved, whereby it appears where *Cestuy q' use* shall be made to procure a Court to be held for his

(1)
1 Rol. 502.

1 Cr. 283.
3 Cr. 349.
Co. Lit. 62. a.

Ante 101.

Ante 100.
Co. Lit. 62. a.

own advantage : wherefore forasmuch as that no Court hath been here held, the interest remains in the Heir, and his Lease is good; And thereupon adjudged for the Plaintiff.

Rice versus Regem.

- (2) **E**Rror of a Judgment given at the Sessions of the Peace at Worcester, Upon an Endicement of Common Barretty, where the party was endicted for a Common Barretty, and at the same Sessions arraigned thereupon, and traverteth it : And a Venire facias awarded immediately to try it; and he was convicted, and instantly fined 40 l. and forthwith committed to Prison, until he satisfied it: And the Endicement and proceedings were removed by Cerciorari, and the party removed by Habeas corpus, who would have discharged himself by exceptions to the Endicement: But it was resolved, that he could not, because Judgment being given thereupon, he cannot discharge it, unless he brings a Writ of Error: Whereupon he brought this Writ, and assigned for Error, that this Trial and awarding a Ven. fac. the same Sessions he was Endicted and pleaded, could not be good; For it ought to have been made returnable at the next Sessions, and not to be made returnable the next day. Vide 22 Ed. 4. Coron 44. Sed non allocatur; For the party being present may be tried as well the same day as at another time, and so is the common experience: And they conceived, that presently after conviction, they may impose a fine, and commit to prison until the fine be paid, which is the Execution for the King.

1 Cr. 448.
4 Inst. 164.
2 Inst. 568.

Berisford versus Woodroff, Executor of Will. Woodroff,
Trin. 14 Jac Rot. 502.

(3)
1 Rol. 461. 2.
1 Cr. 186.

Assumpsit: Whereas the Testator promised the Plaintiff, in consideration he would marry his Cousin at his Request to give him 20 l. and alledgeth in fact, that such a day he married the Testators said Kinswoman; yet neither the Testator nor Defendant, although he had *Assets*, had paid, &c. After verdict, upon Non assumpsit pleaded, it was moved that the Action lay not: First, because it is not alledged that he married her at the Testators request: Sed non allocatur; For he alledging that he married her, it is intended to be at the Testators request. Secondly, because this Assumpsit is not for Debt, but upon a collateral promise, and therefore this Action lies not against an Executor, and in this point it differs from Pincheons Case. Co. lib. 9. fol. 86. That an Executor shall be charged in an Assumpsit for Debt; But here being merely collateral, it lies not: And to that purpose two Presidents were cited; the one betwixt Sanders and Estabie, Trin. 13 Jac. Rot. 932. The other betwixt Herman and Elliot in Hill. 7 Jac. Rot. 230. Dorset. And the promise was,

1 Cr. 195.

1 Cr. 186.
Ante 294.

was, in consideration that the Plaintiff should marry his Daughter, Eliot promised 60 l. and 10 Quarters of Barley in Marriage with her; And for non-payment of the Barley the Action was brought against the Executor, alledging that he married and gave notice. The Defendant pleaded Non Assumpsit, and Judgment against him, and Error thereof brought. And because it was an Assumpsit collateral, all the Justices and Barons held that the Action lay not; as Hoxnel Clerk of the Errors certified, but no Judgment was entered. The other President betwixt Sanders and Estabie was in an Assumpsit against an Executor upon a promise of the Testator, That the Plaintiff should have as much, if he would marry his Daughter as any of his Children had at the time of his death; and avers that such a Child had so much: And after verdict, upon non Assumpsit, Judgment was given for the Plaintiff, and Error thereof brought in the Erchequer-Chamber, but no Judgment therein, because the party died. And Hill. 7 Jac. Rot. 791. betwixt Brinsley and Taylor adjudged accordingly. Vide 14 E. 4. 6. 15 E. 4. 32. 17 Ed. 4. 5. 45 Ed. 3. 24. 31 Ed. 3. Debt. 822. Assise pla. 70. Fitz. Nat. Br. 44. 56 Ed. 120. Another matter was moved in the principal Case, because it is not alledged that notice was given to the Testator or Defendant of this Marriage, and then he cannot pay it at the Marriage-day; and no Damages ought to be given therefore: But this point was over-ruled by reason of a President shewn of a Judgment in this Court, Trin. 44 Eliz. Rot. 238. betwixt Hodges and Warley upon an Assumpsit to pay such a sum at the Marriage, &c. and no time alledged: And it was adjudged for the Plaintiff, and affirmed in a Writ of Error. Note, that in the principal Case a Writ of Error was brought upon this Judgment, and the Judgment was affirmed.

Post. 633.

Post. 417.

1 Cr. 186.

Ante 57. 243.
Ante 102.1 Rol. 462.
1 Cr. 35.

Symonds *versus* Burlow, Trin. 13 Jac. Rot. 549.

TRESPASS, *sur* Assault, Battery, and Wounding: The Defendant quoad the wounding pleads Not guilty; Quoad residuum justifies for an Heriot for certain Lands parcel of the Mannor of Stansted Hall in Windham. The Issue was, whether parcel: The Ven. fac. was awarded de vicineto Manerij de Stansted Hall in Windham, and tried, and Judgment given, and Error for that cause assigned; And held to be no Error, for the Issue being whether parcel of the Mannor, the Ven. fac. is most properly awarded of the Mannor, which hath by intendment the best knowledge thereof. And the Books 6 H. 7. 3. 11 H. 7. 22. were cited against this. But it was said, that was not in the Negative; And where Trespass is alledged to be in the Mannor, upon Not guilty pleaded, the Ven. fac. shall be de vicineto Manerii. So more properly here: Wherefore the Judgment was affirmed by the opinion of three Justices, Absente Coke.

(4)
2 Rol. 621.Ante 327.
Ante 8.
3 Cr. 620.

Termino

Termino Michaelis,
Anno decimo quarto JACOBI Regis
in Banco Regis.

Talkarn *versus* Wrigg, Trin. 14 Jac. Rot. 1304.

(1)

Assumpfit: Whereas the Defendant, in consideration the Plaintiff would pay to him such a sum, promised to take his Son to be his Apprentice for seven years in such a Trade, to instruct him in the said Trade, and find him meat, drink, and apparel durante termino prædicto; And assigns for breach, that he did not find him meat, drink and apparel, &c. But never avers that he put him as Apprentice, nor that the other accepted him: And after Non assumpfit pleaded, and found for the Plaintiff; this matter was moved in arrest of Judgment, that the Declaration was not good, and so held all the Court; for he ought to shew that he was his Apprentice, or otherwise he is not to find him meat and drink: And although it was alledged, that it shall be intended, for as much as the breach is assigned in not finding meat and drink durante termino Apprenticii, which shews that he was Apprentice, and the Defendant admitting it by pleading Non assumpfit; yet all the Court held, that in regard he had not sufficiently entitled himself to the Action, although the Defendant hath pleaded Non assumpfit, and it is found against him, yet the Plaintiff ought not to have Judgment: Wherefore it was adjudged for the Defendant.

Ante 375.

Lewis *versus* Walter, Trin. 14 Jac. Rot. 39.

(2)

Action for these words, 12. Decemb. 13 Jac. John Piers did say, that John Lewis (innuendo the Plaintiff) did say that there is no Prince in England; ubi revera John Piers never spake any such words, but that they were maliciously spoken; and avers, that the King and his Son (now Prince Charles) were then in England: After verdict, and Not guilty pleaded, and found for the Plaintiff, it was moved in arrest of Judgment, that these words were not actionable; first, because they are but the report of the speech of another, and not of his own speech. Secondly, because he doth not shew when the Plaintiff used such words, for it may be in the time when the Prince was not in England, or in the time of the Reign of Q. Eliz. and then it had not been any offence. Thirdly, That the words themselves be not actionable whensoever spoken. And for the first point, Presidents were appointed

pointed to be searched where from the report of the speech of another who never spake such word, an Action would lie; and a preſident was ſhewn, Hill. 4 Jac. Rot. 1159. betwixt the Lady Morifon and Carr, Action, for that he ſaid, Arſcot had reported he had the uſe of her body, ubi revera he never ſpake any ſuch words: It was adjudged for the Plaintiff, and affirmed in a Writ of Error: Wherefore the Court was ſatisfied in this point, that the report of the ſpeech of another, who never uſed ſuch words, is chargeable: But for the other points, they would adviſe, per quæ adjournatur; Reſiduum poſtea 413.

Ante 162.

Poſt. 530. 1.

Memorandum, that upon 18. Novemb. this Term Sir Henry Montague was made Chief Juſtice of the Kings Bench, in the place of Sir Edward Coke the late Chief Juſtice, who being in the Kings diſpleaſure was removed from his place by a Writ from the King, reciting that whereas he had appointed him by Writ to that place, that he had now amoved him, and appointed him to deſiſt from the further executing thereof; And now this day Egerton Lord Chancellor came into the Kings Bench, and Sir Henry Montague one of the Kings Serjeants, being accompanied with Serjeant Hutton and Serjeant Francis Moore, came to the middle of the Bar, and then the Lord Chancellor delivered unto him the Kings pleaſure to make choice of him to that place; And after Serjeant Montague had made his Answer, and returned thanks, and teſtified his endeavour for the well executing the ſaid place, he was brought into the Bar, and there took his Oath: And after the Writ read, the Lord Chancellor delivered it unto him, and he was placed in the Chief Juſtices Seat.

(3)

Cr. 375.

Moor 826. 7.

Sir John Sydenham *verſus* Man, Mich. 13 Jac. Rot. 343.

Action upon the Caſe for theſe words; If Sir John Sydenham might have his will, he would kill all the true Subjects of England, and the King too; and he is a maintainer of Papiſtry and rebellious perſons: The Defendant pleaded, that he ſpake other words; abſque hoc, that he ſpake thoſe; The Jury finds, that he ſpake theſe words, I think in my conſcience if Sir John Sydenham, &c. And found all the other words verbatim, and conclude, Si ſuper totam materiam, he ſpake the words forma qua the Plaintiff declared, they find for the Plaintiff to his damage of 160 Marks; If otherwiſe, for the Defendant: And upon this Verdict Judgment was prayed for the Plaintiff. And Montague Chief Juſtice, Croke and Doderidge held, that this Verdict is found for the Plaintiff; For when they find that the Defendant ſpake all thoſe words in the Declaration, and theſe words more, I think in my conſcience, &c. which he not words of extenuation nor alteration of the ſenſe of the other words, but rather inſorceeth them; For that ſhews that he thought it, and thought it in his conſcience, which is a corrupt conſcience: And the words by themſelves

(4)

1 Rol. 48. 9.
2 Rol. 718. 17.
Hob. 180.Ante 55.
Poſt. 476.

Post. 469.

selves as they are in the Declaration, will clearly maintain an Action; and the addition of these words will not detract from them, but enforce them; and there is no cause to stay the Plaintiffs Judgment; For although he declares of more words than he spake, yet he declaring truly that he spake those words, upon the evidence it appears, that he spake those words which are Actionable; And the words added, diminish not, nor are an alteration of the sense of the words whereof he declares; wherefore although the Issue be specially found, yet the Plaintiff shall have Judgment: As in *Sir John Bridges Case*, 6 El. 9. Dy. 75. But Houghton doubted thereof, because the verdict find other words in part than the Plaintiff declares; But he agreed that those words which are added do not extenuate those in the Declaration; And if he had declared of them, the Action clearly had lain for all the words together: But the verdict finding them to be spoken in another manner than he declares, although they be not so positive as they are in the Declaration, yet they be variant from the words in the Declaration, and therefore although it be found, the Plaintiff ought not to have Judgment. But all the other Justices were against him; wherefore it was adjudged for the Plaintiff. *Note*, in *Mich. 16 Jac.* a Writ of Error was brought upon this Judgment, and the matter in Law assigned for Error; First, that these words be not Actionable. Secondly, that the words found by the verdict do vary from the Declaration, and being specially traversed, it is found for the Defendant. And of that opinion were *Hobert* Chief Justice of the Common Bench, *Winch*, and *Denham*, that these words found in the Verdict, vary from the Declaration; for although they be slanderous, for which an Action well lies, if he had declared accordingly, yet they be not here so positively spoken, as it is mentioned in the Declaration. But *Tanfield* Chief Baron, *Warburton*, *Bromley* and *Hutton*, *e contra*; that the words found in the Verdict, are the same words in substance as they are in the Declaration; And that I spake as I think: Wherefore the Judgment was affirmed.

3 Cr. 224.

2 Roll. 718.

Hob. 181.

27 H. 8. c. 16.

* It was wanted by *Hob. 181.*
 of *Judgt.* was *reversed.*

Dymmocks Case in the Court of Wards.

(5)
 1 Rol. 627.
 Hob. 136.
 27 H. 8. c. 16.

UPON an Office after the death of Sir Henry Dymmock, for the Mannor of D. in Ordington in the County of Warwick; It was thereby found, that the said Mannor by Indenture 13. July, 13 Jac. was bargained and sold to Sir Hen. Dymmock and his Heirs for 3000 l. That upon 4. Octob. 13 Jac. he died, and that upon 30. Octob. 13 Jac. this Deed was enrolled, and that his Cousin and Heir, who was married to Sir Walter Earl, was of the full age of 21 years at the time of his death; And that the Mannor is held by Service of Knighthood in capite: And whether his Heir shall sue livery, or shall be in quasi by descent, and not merely by descent, and in nature of a Purchaser,

in

in whom the Land is first vested, was the question; And referred to the two Judges Assistants to the Court: Which being moved before Montague Chief Justice, Hobbart Chief Justice of the Common Bench, and Tanfield Chief Baron, they held, that he should be in by Descent, and should sue Livery: For when the Inrolment comes, and there is no Act in the interim done to stop it, the Estate vested in the Ancestors ab initio by the uses limited; For the Statute being, That nothing shall pass, &c. excepting by Deed enrolled, &c. When the Exception is performed, it is in the Ancestor by the Statute of Uses; And therefore the Heir, being within age, shall be in Ward, and being of full age, shall sue Livery: And it is not like to Billingham's Case; That a Bargain, before Inrollment, Bargains and Sells to another, and afterward the first Deed is inrolled, and after that the second Deed was inrolled also, yet nothing passed; For he had not any Estate in him at the time of the Bargain, to give to a stranger: So in Shelley's Case, the Heir was in quasi by Descent, yet he was not in Ward, because the Use never vested in the Ancestor. Vide Co. 1. fol. 59. a. Woods Case cited in Shelley's Case: Wherefore the Justices here would advise, and did not give any Resolution therein.

Hob. 136.

Ante 52. 3.

Sir John Cutts *versus* Bennet.

Action brought by an Administrator for Debt reserved upon a Lease for years by the Intestate; And for Rent arrear in his time, the Action was brought; And he shews how Administration was committed by the Arch-Bishop; But he doth not say, quod profert hic in curia literas Administrationis. The Defendant pleaded, and found for the Plaintiff; And it was now moved in arrest of Judgment, that the not shewing of the Letters of Administration was matter of Substance, which made the Declaration vicious, and not aided by the Statutes of 18 Eliz. or 32 H. 8. by the Aedificas; For that enables the Plaintiff to his Action, and the omission thereof takes from the Defendant the advantage which he might have by demanding Oyer thereof: And although it were alledged that the Defendant might plead Non debet, and pass over the advantage, by demanding Oyer thereof, and he could not have Oyer of them in another Term, and therefore it is not so material now, as if the Defendant had demurred; Yet the Court resolved, that it was a matter of Substance, which ought to be shewn by the Plaintiff, to enable himself to his Action; and the Defendant shall have advantage thereof at any time: Wherefore it was adjudged for the Defendant. Vide 28 H. 6. 31. 16 E. 4. 8. 21 H. 6. 23. Plowd. 52.

(9)

Ante 299:
Post. 556.
Hob. 32.

Post. 412.

Doctor Hackwell and his Wife *versus* Eustman,
Hill. 13 Jac. Rot. 1258.

(10)

Account, by the said Doctor and his Wife as Executrix of John Eyres Merchant, against the Defendant, to render unto them reasonable account from the time that he was Bailiff of the said John Eyres, pro eo quod *le Defendant fuit Bailie* to the said John Eyres, ex quacunque causa & contractu ad communem utilitatem of the said John Eyres and of the Defendant, and of one William Palam, from the first of Octob. 3 Jacobi, unto the 20th of May next following, de quibusdam Merchandizis of the said John Eyres, of the third part of 38 Tun of Wine, &c. which Merchandise the said John Eyres (the Intestate) the Defendant, and William Palam, in the life of the said John Eyres, had and occupied in common ad communem utilitatem eorum; Ac eadem pro tempore predict. to the hands of the Defendant by the assent of the said John Eyres and William Palam to Merchandise for their common Profit fuerunt commissa: The Defendant pleaded *Nunques son Bailie*, and found against him; And now moved in arrest of Judgment; First, because he declares against him, and demands Account as his Bailly generally, which is intended as a general Bailly: Whereas he shews afterward for cause, that he was his Bailly ex quacunque causa & contractu ad communem utilitatem of him and the Defendant, and William Palam: So the account is betwixt Merchants and Tenants in Common, which is an especial account, and he ought not to have demanded it in general. Vide lib. Entr. fol. 18. & 19. 30 Ed. 1. Account 127. Sed non allocatur. A second Exception, because he demands an Account of a Third part of such Goods, where he alone ought not to demand the Account, but he ought to joyn the others with him: And if he should have it sole, yet he ought to demand the Account for the Entire: So as there might be deduction out of the Gain and Loss of the entire, and not to demand it of the third part: Sed non allocatur; For it was said, that he might sue although his Companion would not; And it may be, that he solely committed his third part, wherefore he only might demand the Account: Wherefore without argument it was adjudged for the Plaintiff.

The Bailiffs and Commonalty of Ipswich *versus* Richard Martin Assignee of Robert Denny and Joan Parker Executrix of Will. Parker, Hill. 13 Jac. Rot.

DEbt for 30 l. in the debet & detinet; for that William S. (11) was seised in fee of such Lands holden in Socage, and devised them to his *Feme* for life, and after to Robert Denny and Will. Parker for twenty one years rendering 60 l. Rent by the year; And after to Justice Clinch and others in fee, to the intent they should give it to the Bailiffs and Commonalty of Ipswich, for certain charitable Uses, and dies: Afterward the said Lessees enter; and Robert Denny assigned his interest to Rich. Martin; That afterward Justice Clinch and the other Devisers entred, and ouated the Lessees, and infeofed the said Bailiffs and Commonalty, and afterward the Lessees reentered; And upon the last of August 13 Jac. William Parker made his *Feme* one of his Executrices, and died; and for Rent due at Mich. following this Action was brought: And upon this Declaration it was demurred; The principal question was, whether debt in the debet & detinet lies against the Executor of a Farmor for Rent due after the death of the Testator, he having taken all the profits besides for one month; And Croke, Doderidge and Houghton held that it did. For that the rent came not due but in the time of the Executrix; and the Ante 238. entring is chargeable as for her own Act, and her proper goods are liable to the Execution for this debt, especially as this case is; Forasmuch as for the one which was against the Assignee, it ought to be in the debet & detinet, so it ought to be against the Executrix; and the Lessors shall not be enforced to sue them severally, but they shall have one Action against both; For the Act of the Lessee shall not divide the Action of the Lessors: And therefore they said, that if Lessee for years will assign all his term in part of the Land, the Lessor shall have a joynnt Action against the Lessee and Assignee: So if two Lessees make partition, the Lessor may have one action against them: wherefore they held, that the action was well brought. A second objection was, because the Plaintiffs being a Corporation, entitle themselves by Feoffment, and do not shew Libery to be executed by Letter of Attorney; For they may not take, unless by Letter of Attorney: Sed non allocatur; For all necessary circumstances shall be intended to be executed, as well as in a Feoffment pleaded to other persons: wherefore it was adjudged for the Plaintiffs. Post. 637. 1 Cr. 170. 482. Pl. Com. 149. b. Co. Lit. 303. b.

The King *versus* Hutchings.

- (12) **S**cire fac. Upon a Reconuſance for the good behaviour taken in the Crown-Office: The breach assigned was, because he assaulted and beat one upon such a day, and he doth not say, vi & armis; And for this cause, after Verdict, the Exception was taken, and Judgment stayed.

Sir John Cutts *versus* John Bennet.

- (13) **D**ebt, as Administrator of Sir John Cutts his Father, for rent reserved upon a Lease for years, arrear in the life of his Father: After Verdict, upon Issue de non detinet pleaded, It was moved that the Declaration was not good, because he doth not say, Quod profert hic in curia literas Administrat. And because it was matter of Substance to entitle him to the Action, and not of Form only, It was therefore adjudged for the Defendant.

Termino

Termino Hillarii,

Anno decimo quarto J A C O B I Regis
in Banco Regis.

Lewes *versus* Walter. Ante fol 407. was now moved again; and all the Justices besides Houghton held clearly that the action lies: For being alledged that he spoke them on purpose to draw him in question for his life, it shall be taken in the worst sense, the Defendant having pleaded Not guilty, and being found guilty: And if he had any other intention, he would have shewn it by way of excuse; But as they are spoken they touch him in his Loyalty, that he spake in derogation of the Prince; which is a capital offence if it had been true. And to the second objection, that he doth not shew when he spake them, it is not material: For the party alledges that he never spake them, and that the other never reported them: wherefore he cannot shew any time of the speaking of that which never was spoken: whereupon it was adjudged for the Plaintiff. (1)

Doctor Husley and his Wife, and others, *versus* Francis More, Trin. 14 Jac.

Error brought of a Judgment given against them in the Common Bench, by Francis More in *Ravishment de gard*, where Judgment was given for the Plaintiff: Upon argument by all the Justices it was unanimously agreed, (notwithstanding divers exceptions alledged in stay of the Judgment after Verdict, and divers Errors assigned,) That that Judgment against Baron and Feme, where the Baron was acquitted; Ought not to be against a Feme covert by the Statute of West. 2. cap. 35. Secondly, that the Verdict not finding the age of the Heir at the time of the Ravishment, nor the Marriage, nor by whom he was married, nor that he was married without the Plaintiffs assent, was not good. Thirdly, that the Judgment of the Damages, and of the value of the Marriage was not good. It was also moved, that neither upon the return of the Original Writ before the Sheriff, nor after in Court, any Pledges were returned; (Vide the Case for these matters in Law, more at large in Co 9. fol. 71.) The Defendant pleaded in Nullo est erratum; and now this Term it was argued upon the Exception only for want of Pledges; and the points adjudged not meddled with: And after Arguments at the Bar, all the (2)

Co. 9. 71. b.
Hob. 93.

Co. 9. 73. a.
Hob. 93.

Co. 9. 74. a.
Hob. 99.

Co. 9. 74. b.

1 Cr. 92.
1 Cr. 594.

Post. §34.
Ante 329.

Hob. 101.

the Judges severally delivered their opinions, and they all agreed that at the Common Law it was clearly Error; for which the Judgment should be reversed; for, for the Kings and parties benefit, the Plaintiff ought to find pledges, that if he be non-suited, he and his pledges shall be amerced; or if the verdict finds against him in any part, he was to be amerced: Which was grounded upon great Reason, That the Plaintiff should not trouble the Kings Court, or the party, without cause; and if he did, he should be punished: And those pledges ought to be found either upon the purchase of the Writ in Chancery, or before the Sheriff, before he execute the Writ; for otherwise the Sheriff is not bound to serve the Writ, but may return that the Plaintiff had not found pledges; yet he may serve it if he will: And if the Plaintiff doth find pledges at any time pendant the plea in Court, it shall be good enough; but if no pledges be found pendant the Plea and Judgment is given, it is Error, and cause to reverse the Judgment. Vide 9 Ed. 4. 27. 18 Ed. 4. 9. 11 H. 4. 7. 2 H. 7. 1. & 17. Dy. 288. Cok. 8. fol. 61. But the principal question was, whether it were aided by the Statute of 18 Eliz. by the body of the said Statute, which aids defects in Returns, defects of Form, &c. was out of the Proviso, that that shall not extend to Writs, or penal Laws. And Houghton held, that it is within the Body of the Act, and out of the Proviso; for penal Laws are intended these actions which are popular, and a Penalty in gross for the King, or for the Party; But not to those which give greater damages, as actions of Waste, actions of Debt, upon the Statute of 2 Ed. 6. for they are out of the Proviso, and within the Act, as it hath been oftentimes resolved; wherefore he conceived it was not Error after Verdict. But Montague and Croke held, that it is not aided by the Body of the Act; for that only redresses defaults in form, or misreturns, or insufficient returns, or want of warrant of Attorney, or wants of Original; which all may hap in negligence of not filing, or in the insufficiency of the Clerk: But not finding of pledges is merely the act of the party, which is not aided, although it be within the words in the Body of the Act, yet it is clearly excepted by the Proviso; for this action is founded upon a penal Law, which the Proviso excepts clearly out of the Act; for it is very Penal, extending to Banishment and perpetual Imprisonment, and is more penal than any forfeiture of any Sum: And as to this point Doderidg agreed with them, that it is excepted by the Proviso; But he held, That Statutes which give only addition of Damages, are not to be accounted penal Laws within this Proviso, as the Case of Waste, or Forcible Entry upon the Statute of 8 H. 6. for those give only more Damages in satisfaction, but do not add any corporal Punishment. But here is the greatest penalty that can be, except the loss of Life or Member: And therefore there

there be thre kinds of penal Lawes, poena pecuniaria, poena corporalis, poena exilii, and here be two of these penalties ; Wherefore they thre resolved, that this is not aided by the Statute of 18 Eliz. And it was adjudged for this cause, that the first Judgment should be reverſed : But for the principal matter there was not any Argument made, or opinion delivered.

Machin versus

ERror of a Judgment in Debt ; The Error assigned, because (3)
the Judgment is, Ideo consideratum est quod recuperet 40 s. 2 *Sand.* 107
pro misſis & custagiis, omitting these words, ex assensu suo per curiam ei adjudicat. And it was held to be a material part of the *Post.* 587.
Judgment ; For being by confession or default, Writ of Inquiry of Damages shall be awarded, unless the party consents to take so much for Damages ; And for this cause it was reverſed.

Mylward versus Watts.

ERror of a Judgment in the Common Bench in an Ejectione firmæ : The Error assigned because that in the first Declaration he declares of a Lease 30. Decemb. 10 Jac. habendum ab eodem die for thre years, and the Ejectment was the 30th of January following : And in the second Declaration, after Imparllance, he declares of a Lease made the 30th of January Habendum from the 30th of Decemb. before for thre years ; So he hath one time from the beginning of the Term, and the end of the Term ; And this being after Verdict, it was moved to be aided by the Statute of 18 Eliz. for it shall be intended that the Judgment was given upon the second Declaration, and without Original : But the Court resolved, upon conference with the Prothonotaries, that the first Declaration is the material Declaration : And this being variant from the latter in substance, the Judgment is erroneous ; and for that cause was reverſed. *Ante 105.*

Webb versus Hearing, Hill. 13 Jac. Rot. 606.

Ejectione firmæ, for a Messuage in London : Upon a special Verdict the Case was such ; William Say was seised in fee of this Messuage holden in Socage, having Margaret his Feme, Francis his Son, and three Daughters, Agneis, Alice, and Elizabeth, and deviseth the said Messuage in this manner : I bequeath to Francis my Son my Houses in London, after the death of my wife ; And if my three Daughters (5)
1 *Rot.* 835.6.
Moor 853.

ters and either of them do over-live their Mother, and Francis their Brother and his Heirs, then they to enjoy the same Houses for term of their lives; and the same Houses then I give to my Sisters Sons, Roger Wittenbury and John Wittenbury, and they to pay yearly to the Batchelers Company of Merchant-Taylors 6 l. 10 s. And if they or their Successors deny the payment of the said Sum, then it shall be lawful to the Wardens of the said Company to enter and discharge them for ever. It was found that the Devisor died, the Son and two of the Sisters died without Issue; The Feme Margaret survived them, entred, and died; Elizabeth the third Sister survived, entred, and died, having Issue the Defendant; John Wittenbury died, Roger entred and died; Henry Pierson the Lessor his Cousin and Heir entred, and made that Lease; The Defendant as Cousin and Heir of Francis the Son ousts him, &c. The principal Question was, whether Francis the Son had a Fee or a Fee-tail by this Will, in regard the limitation is, If his Sisters survive him and his Heirs: And the Court resolved, he had but a Fee Tail; For Heirs in this place is intended Heirs of his body; For the limitation being to his Sisters, it is necessarily to be intended, that it was if he should die without Issue of his body: For they are his Heirs collateral. And therefore there is difference where a Devise is to one and his Heirs; And if he die without Heirs, that it shall remain, it is void, as 19 H. 8. 9. Yet when a Devise is to one and his Heirs, and if he die without Heir, it shall be to his next Brother; There is an apparent intention what Heirs he intended; and the intention being collected by the Will, the Law shall adjudge accordingly. Vide 18 Eliz. Dy. 333. Chapmans Case. Co. 6. fol. 16. Wilds Case. The second point, whether John Wittenbury and Roger Wittenbury had a Fee by this Devise: And it was resolved they had; because they had paid a consideration for it, viz. an Annual sum; And the words, If they or their Successors deny the payment, shew the intent, that it should go to their Heirs. Vide 4 Ed. 6. Estate, Br. 78. Cok. 6. fol. 16. A third point, the Estate being limited, And if my three Daughters and either of them over-live their Mother and Brother and his Heirs, then they to have it; and after them John Wittenbury and Roger Wittenbury, &c. Whether this be a Contingent Estate, and if whether it were performed, two of the Daughters dying in the life time of their Brother; And it was resolved, that this was no limitation contingent, but shews when it shall commence, which is well enough performed: wherefore it was adjudged for the Plaintiff. I was of Counsel with the Plaintiff.

Ante 290.

1 Cr. 58.

Hob. 30.

Moor 533.

Post. 428. 448.

695.

3 Cr. 525.

Post. 527.

1 Cr. 158, 159.

Hob. 65.

3 Cr. 378.

1 Cr. 367.

Co. 9. 128. a.

Hob. 65.

x Cr. 186.

Smalman *versus* Agborow, Mich. 13 Jac.
Rot. 609.

TRESPASS, for entering into his Land in Dodenham, and for chasing out his Beasts therein; Upon special Pleading and demurrer thereupon, the Case was such; Baron and Feme (in right of the Feme,) and a third person were Joyntenants for the lives of the Feme and the third person; The Baron and Feme by Indenture let the money for one and twenty years; The Feme died, the surviving joyntenant enters, and drives out the Beasts: The Lessee brings Trespass: Whether this Lease shall bind the survivor, was the question: It was objected, that this Lease should not bind; For although it was agreed, where one Joyntenant for life makes a Lease for years, and dies, it is good during the life of his Companion; as Dy. 3 Eliz. 187. And a Case adjudged between Herbin and Birton; yet here, because the Baron was not Joyntenant, unless in right of his Feme, and had not any power to contract for any longer time then during the life of his Feme, and the Feme here is dead; and unless she had survived and accepted the Rent, it is not her Lease, but void quoad her, (For during the Coverture she had no power to assent) Therefore the Lease in Law is accounted void quoad her and the survivor. Vid. 7 Ed. 4. 7. But all the Court held, that the Lease was good, and is as a Lease made by her, until she after the Coverture, or one who claims in privity by her, avoids it by Entry; For it is not void by the death of the Baron, but only voidable, and the avoidance ought to be by Entry; and which cannot be by the Joyntenant survivor, for he is paramount the Feme, and not under her, And therefore the Lease being good, until it be avoided by one who hath privity, shall bind, as long as any of the Joyntenants be alive, as in case where a man joyntenant makes a Lease for years: Wherefore it was adjudged for the Plaintiff.

(6)

Co. Lit. 186.b.
Ante 91.Ante 332:
Post. 617.

Sanders *versus* Esterby, Trin. 13 Jac. Rot. 932.

ERROR in the Exchequer-Chamber, of a Judgment in the Kings Bench in an Assumpsit against an Executor, upon a promise of the Testator, who in consideration he would marry his Daughter, promised he would pay unto him 100 l. and leave unto him as much as he left or gave to any of his other Children; And alledges in fact, That he left so much to one of his Children; And for non-performance of this last part of the promise, he brought the action, and avers, that the Testator left *Assets* as well to discharge all his debts and legacies, as to satisfy him: And after verdict, upon Non assumpsit, being found for the Plaintiff, and Judgment given

(7)

Ante 405.

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accordingly,

Post. 663.

accordingly; Error was brought and assigned, that the Executor is not chargeable for this collateral promise. But without argument all the Justices and Barons (besides Tanfield Chief Baron) held, that the Action well lies against the Executor as well for this collateral promise as for a Debt: but Tanfield doubted thereof; For he said, it had been oftentimes adjudged, that upon such a meer collateral promise, the Executor is not chargeable; Notwithstanding without further debate Judgment was affirmed. Note, Hoxwel, Clerk of the Errors said, that once they were all of an opinion to reverse the said Judgment.

Gibbins *versus* Vaughan, Mich. 11 Jac. Rot. 41. & 42.

- (8) **E**Rror of a Judgment in the Common Bench; The Error assigned, because in Debt by an Attorney by privilege, the Declaration mentioned, that the Defendant was attached by a Writ of Privilege, and appeared, and imparled, and after Judgment being given upon Nihil dicit, there was not any Writ of Privilege filed: And for that cause the Judgment was reversed. Vide Dy. 288. 19 Ed. 4. 8.

Parker *versus* Sanders.

- (9) **I**Nformation upon the Statute of 39 Eliz. for not restoring pasture into Tillage, being ancient tillable Lands, and converted into Pasture: Upon Not guilty pleaded, it was found, that this Land was ancient Tillable Land, and used for Tillage twelve years before the conversion, and converted before the Statute of 39 Eliz. and not restored before 1. May 1599. nor ever since; And that the Defendant was only an Occupier for the last year, being the time in the Information mentioned, but never before: And whether he were punishable as an Offender within this Statute, was the question, upon an especial Verdict; For the words of the Statute are, That Lands converted before the Statute shall be restored into Tillage before the first of May 1599. and being restored shall be so continued for ever; And for this cause it was moved, that this Case is out of this branch, for not being restored, none is compellable to convert it, especially as this Case is, a stranger being Occupier thereof, and not he who converted it: But all the Court resolved, that he is within the Statute; For although he be out of the words of the Statute, yet he is within the intent thereof; For this Statute extends to punish the Occupier and continuer thereof in pasture, and not only the first converter: And if any other construction should be made, then all Lands which were converted before the 9 Eliz. and not reconverted before 1. May, 1599. should be out of the Statute, which never was held to be the intent of that Law, for then the convertor should be punished only for two years by the

the Act, not restored, and no punishment should be after upon any for continuance thereof; and by this means the Statute should be to little purpose, for any Land converted before the Statute; which never was the intention of the Law: Wherefore they all resolved, that this was within the Statute; and adjudged it for the Plaintiff.

May *versus* Peter Proby and Lumley, Sheriffs of Middlesex, Pasch. 13 Jac. Rot.

Action upon the Case; For that they suffered William Allen, (10) who was arrested at his suit upon a Bill of Midd. for 33 l. Moor 852. to escape, whereby he went to places unknown, by reason whereof 1 Rol. 807. he lost his Debt: The Defendants plead, that after the arrest they 3 Cr. 868. leading him towards London to the Gaol, he was Rescued from Jones 201. their Bailies by J. S. and J. D. and it was thereupon demurred; and after divers arguments at the Bar, it was adjudged for the Defendants; for the arrest being upon mean process, and not upon Execution, the Sheriffs are not bound to take the Posse comitatus with them, and therefore upon such process, it is a good return, to return the Rescous; and that afterwards he was not found within their Bailiwick; and Process shall thereupon be awarded against the Rescuers: But if the Prisoner had been once in the Gaol, the Sheriff ought at his peril to keep him, and a Rescous from thence is no excuse for him: And upon process of Execution, as upon a Capias ad satisfaciend. or upon Cap. utlegat. after Judgment, such a return is no excuse for him, either against the King or party; for he at his peril ought to keep his Prisoners taken in Execution; for there the Process is determined, which being the life of the Law, and being once executed, the party may not have any new Process; and therefore he shall answer to the party for the escape: And it is at the Sheriffs peril to see that his Prison be strong enough to keep his Prisoner, when he is once in Execution; and being a mischief to one, it ought rather to fall on the Sheriff than on the party: But in the other Case there is not any great mischief, for the party hath only lost his Process, which he may renew; and he may also have an Action upon the Case against the Rescuers; and of so small a loss, as the loss of a Process, the Law hath not any regard to punish the Sheriff, especially when the party may have any other remedy: Wherefore it was adjudged for the Defendants. Vide 3 H. 6. Attachment 1. 4 Eliz. Dyer 212. 8 Eliz. Dy. 241. 16 Ed. 4. 3. 17 Ed. 2. Execut. 247. 6 H. 7. 12. 16 Ed. 3. Return 110. 1 Rol. 807. Moor 852. 3 Cr. 868. Jones 201. 1 Rol. 807. 1 Rol. 807. Post. 486.

Note, that there was a President here shewn, Pasch. 43 Eliz. Rot. (11) 276. betwixt *Waldoe* and *Lambert*, where in such an Action upon the Case against a Sheriff for suffering a Prisoner to escape, arrested by *Latitat*, he pleaded, that he was rescued from him at another

3 Cr. 868.

ther place then the Plaintiff alledged the escape to be ; And traverseth the escape, *alibi* ; And upon demurrer it was adjudged for the Plaintiff, which was affirmed at the Bar to be ruled upon the matter in Law. But the Court upon view of the President, conceived that the Plea was ill, by reason of the traverse of the place, and so it might be adjudged for that point for the Plaintiff ; And they all here *seriatim* delivered their opinions, that this is a good plea, they pleaded the rescous, and naming the parties who made the rescous, so as the Plaintiff might have his plea against them ; And the Plaintiff by his demurrer confessing it, the plea is good : Wherefore it was adjudged for the Defendant.

Ahmore *versus* Ryley, Pasch. 14 Jac. Rot. 554.

(11)

3 Cr. 737.8.

Co. 8. 60. a.
Ante 54.

Ante 69.

Error of a Judgment in Rippon ; The first Error assigned was, because in Debt upon an Obligation of 100 l. he declares, Quod per scriptum suum obligatorium concessit se teneri, &c. And he doth not say, Sigillo sigillatum : Sed non allocatur ; For that is intended by the words, concessit per scriptum, &c. And the usual course is so in the Common Bench, and sigillo sigillatum is no more of necessity then deliberatum, which is always intended. Another Error assigned was, that the Defendant pleading Non est factum, and Issue being joyned thereupon, he afterwards relicta verificatione confessed the action, and that it was his own Debt, and the Judgment thereupon was, quod sit in misericordia, where it ought to have been, quod capiatur, because he denied his own Deed : Sed non allocatur ; For the Issue not being tried, but the action confessed, the usual course is only, quod sit in misericordia. Vide 9 Ed. 4. 24. 33 H. 6. 54. A third Error was assigned, because the Judgment was, Quod recuperet debitum & 6 s. 8 d. pro damnis occasione detentionis debiti, and there is not any mention pro misis & custagiis ; Sed non allocatur ; For damna includes both, and so is the usual course of Entries : Wherefore the Judgment was affirmed.

Philip Cottom, Executor of Anthony Cottom *versus* Wescot, Trin. 13 Jac. Rot. 595.

(12)

Post. 441.

Error of a Judgment in Debt against him as Executor for 40 l. He appeared, and pleaded, Plene administravit and found against him, and Judgment accordingly ; and it was now assigned for Error, that at the time of his appearance he was an Infant and ought not appear by his Attorney, but by Guardian : The Defendant pleaded In nullo est erratum, supposing that it was not Error, for that he did not sue for his proper Debt, but as Executor, and so represented the person of the Testator who was of full age. Residuum postea fol. 441. Where the Judgment was reversed.

Termo

Termino Paschæ,

Anno decimo quinto JACOBI Regis

in Banco Regis.

Atwoods Case.

ERror brought by him to reverse a Judgment upon an ⁽¹⁾ 2 Rol. 78. Endowment, before Justices of Peace for scandalous words; That the Religion now professed was a New Religion within Fifty years, Preaching was but prating, and hearing of Service more Edifying than two hours Preaching: And being thereof convicted, was fined 100 Marks. The Error assigned was, that this was not any offence inquirable by Endowment, and before Justices of Peace, but only before the High-Commissioners, and it was referred to the Kings Attorney to consider thereof: And Sir Henry Yelverton Attorney-General certified, that it was not inquirable before them; and of that opinion was the Court, but they would advise.

Lightfood *versus* Lenet, Ebor.

Trespas, for taking two Steers; The Defendant Justifies by vertue of the Kings Patent of grant to him and ⁽²⁾ 2 Rol. 196. his Heirs, That he should take at two Bridges within his Manor of Doncaster, called Saint Mary-Bridge and Willow-Bridge, such Toll for the passage of Beasts as is used to be taken ibi & alibi infra Regnum Angliæ, rendyng Rent per annum: and avers that at Borrow-Bridge in comitat. Eborum, there was used to be taken 6 d. for every score of Beasts there passing, and therefore 12 d. Toll for the passage of forty Beasts; he Justifies, *Et preys aide de Roy*. The Plaintiff replies, that at those Bridges never any toll used to be taken; whereupon it was demurred: And now after argument, it was adjudged, that he should be ousted *de aide*; For the grant of such toll which is taken ibi & alibi infra Regnum Angliæ, is uncertain and void; also the Patent, that he should have such Toll which had been used to be paid ibi vel alibi,

alibi, &c. and he adverting payment at another place, but not there, it was therefore ill: Wherefore it was awarded that he should answer, &c.

Brian Nelson, Son and Heir of Thomas Nelson
versus Staff.

(3) **E**Rror in an Action upon the Case brought in the Common Bench for words; whereas Thomas Nelson was, and yet is, seised in Fee of Lands, to the value of 100 l. per annum, and was Espoused to Eliz. and had Issue betwixt them, the Plaintiff; And whereas communication was betwixt the Plaintiff and one Mary Syvedale, concerning a Marriage betwixt him and the said Mary, and he was offered in Marriage with the said Mary 600 l. That the Defendant on purpose to scandalize him, and to hinder him of his said Marriage, having communication with J. S. of the Plaintiff, said these words of the Plaintiff, (viz.) Hath that Bastard Brian Nelson caused you to be arrested? Is that all the spight that Bastard can do you? By reason of which words he lost his Marriage, &c. The Defendant pleaded Not guilty, and found against him to his damages 100 l. and Judgment given for the Plaintiff; That these words, (notwithstanding they were spoken in this manner by interrogation,) were actionable, and now a Writ of Error being brought, the Errors assigned were; First, because the words were not actionable. Secondly, because it is not shewn that he was Son and Heir of Thomas Nelson at the time of speaking the words; But only names him Son and Heir by way of addition in the beginning. Thirdly, he doth not say, that Thomas Nelson was seised of these Lands at the time of the words speaking, but saith only, Quod fuit & adhuc seiscitus est: Sed non allocatur; For this Action is not for slandering his Title, which peradventure would not be without these circumstances precisely shewn; as it is in Bannesters Case, Co. 4. Rep. 17. a. But it is for hindring him of his Marriage, which he hath lost by reason of these words, and whereof a man may be hindred by reason of the stain in his Blood, and which action peradventure he might have although he had not any Land at all; and it is but an inducement, and needs not such precise certainty: And for the words themselves, they all resolved, that they were spoken affirmatively, and not only by interrogation, and they be such a slander by these circumstances shewn, that he lost his Marriage by reason thereof, and therefore the action well lies; and the Judgment was affirmed.

Co. 4. 17. a.
Ante 323.

Ante 323.
Post. 368.

Furfer and Bond *versus* Prowd, Pasch. 14 Jac. Rot. 354.

DEbt upon an Obligation of 100 l. conditioned for the performance of the award of Edward Hadds of all matters betwixt them : The Defendant shews, that the arbitrement was in this manner ; “ *Utercas* there was a Controversie betwixt the Plaintiff and Defendant, concerning the Lease of an House in Canterbury, which the Defendant claimed by Lease from the said Bond for six years, rendring 15 l. per annum, quarterly ; which rent was arrear for a year : That he should pay for this Rent to John Furfer 13 l. 6 s. 8 d. And that he should enjoy it for three years and a half, and should pay half yearly for it to the said John Furfer 15 l. at the Annunciation, and Saint Michael, or within forty days after : And that if he failed of the payment, that then the award for his enjoying it should be void. The Defendant pleaded payment of the said 13 l. 6 s. 8 d. at the days, and pleaded the tender of the said Rent at the said Tenement, and that none were there to receive it ; and it was thereupon demurred. The first question was upon the award to pay this Rent or Sum ; whether it were a sum in gross, and payable without demand ; And it was resolved, That it is a sum in gross, and payable without demand, by the Defendant at his peril, who ought to seek out the Obligee to pay it. Vide 8 Ed. 4. 21. 21 Ed. 4. 2. 6 Ed. 6. Bro. Tender 20. Secondly, it was held, that this tender (admitting it might be upon the Land,) is not sufficient ; for it is not pleaded to be made the last instant, as it ought to be ; wherefore the pleading that he tendered it at the feast, and doth not say the last hour, is not good. Thirdly, it was held, that this conditional award, if he did not pay those sums, that it should be void for the enjoying of the House, is good enough ; for it is absolute, if the other pay the Rent, otherwise it is his own default : Wherefore it was adjudged for the Plaintiff. (4)

1 Cr. 77.
Ante 145.

Cooper *versus* Smith.

Action for these words, Thou hast killed thy Masters Cook (inquendo one John Yarrington Servant to Mr. Dingley) who was murdered : The Defendant pleaded Not guilty, and found against him, and moved in arrest of Judgment, because he doth not shew who was the Plaintiffs Master, nor that Mr. Dingley was Master to him who was slain, so the words are uncertain, Sed non allocatur ; For it is not material who was the Plaintiffs Master, because the words in themselves import slander : wherefore it was adjudged for the Plaintiff. (5)

Ante 331.

Ante 306.

Lewis *versus* Coke.

(6)

Ante 114.

Action for these words, Thou hast committed Treason beyond the Seas, and hast run away from thy Captain; And adjudged that the Action lies, for there is a violent intendment, that he committed Treason to the State here, and not to a foreign State, and the Treason is triable here; and the addition, that thou hast run away from thy Captain, do not detract from the first words, nor are they material to the Action.

Loyd *versus* Pearse, Hill. 9 Jac. Rot. 832.

(7)

Co. 10. 131. a.
Ante 343.
16 Int. 260.

Action for these words, Thou art a Bankrupt Rogue, and accounted a common Knave; And thou art a Thief, and hast stoln my Corn: *Quoad* the first words, Thou art a Bankrupt Rogue, and accounted a common Knave; The Defendant pleaded Not guilty, *quoad* the other words he justified; And Issue being thereupon, and both Issues found for the Plaintiff, and damages for the first words 12 d. and for the last words 39 s. and costs for both, the Plaintiff having Judgment for both, for this cause it was reversed; For the first words in the first Issue are not actionable, the Plaintiff being neither Merchant nor Tradesman; and the Judgment being entire, it is reversible in toto; For in the Judgment the damages are conjoynd, although they were severed in the Verdict.

Newman *versus* More.

(8)

Hob. 80.
1 Rol. 670.

Error of a Judgment in the Common Bench in a second deliverance upon demurrer in pleading; The Error assigned was, because there was not any Writ of second deliverance certified; And In nullo est erratum being pleaded, It was moved by Coventry the Kings Solicitor, that it was not material, for it is awarded upon the Roll, and the Parties appearing, and pleading thereto; It is not now material. But it was adjudged to be ill, and reversed for that cause; For there ought to be a Writ, and if it vary in substance from the Declaration in the Replevin, it shall be abated: Wherefore it was reversed.

Harrington *versus* Garraway, Pasch. 15 Jac. Rot.

(9)

1 Rol. 938.
2 Rol. 470. 2.

Debt for Rent, upon a Lease for years: The Case was, Sir Will. Cokeyn Conussee of a Statute, takes a Lease for years of the Reversion, and Rent reserved upon the Lease for years; The Lessee Attorns, the Conussee assigns over this Lease for years; Afterwards Harrington being Conussee of the

Puisny

Prinsy Statute extends this reversion and Rent: And afterwards ^{2 Rol. 472.}
 Sir William Cokeyn by vertue of the elder Statute, extended
 this Reversion and Rent: And which of them should have the
 Rent was the Question; And it was adjudged without much ar- ^{Hob. 46.}
 gument, that the first Conusée by acceptance of the Reversion
 and Rent, and assigning it over, the extent is thereby suspended
 during that Term, and the second Conusée might well extend it
 against him. *Resid. postea 477.*

Broking *versus* Cham.

A Scampfit, that he should enjoy such Lands according to his ⁽¹⁰⁾
 Lease, without the let, interruption, or incumbrance of any
 person; And shews in fact that this Land was extended for Debt
 due to the King by process out of the Exchequer, and so incumbered,
 &c. After Verdict it was moved in arrest of Judgment, that this
 was not a good breach assigned, for he doth not shew for whole
 Debt, nor when, nor by whom it was due; And it may be that it
 was for the Plaintiffs own Debt: And although it was alledged,
 that if so, and he thereby did not perform the promise, it would
 not help him: Yet it was adjudged for the Defendant; For the ^{Ante 315.}
 Plaintiff ought to shew a lawful Incumbrance; Otherwise he ^{Post. 444.}
 might have his remedy elsewhere. *Dyer 328. 2 Ed. 4. 15.*

Piers Griffith *versus* Hugh Middleton.

A Uditā querela to avoid a Statute upon the Statute of Usury. ⁽¹¹⁾
 ry: The Defendant pleaded, quod respondere non debet, ^{2 Rol. 135.}
 because he was outlawed at the Suit of Thomas Moston by the
 name of Peter Griffith; And it was thereupon demurred. First,
 because that Peirs and Peter are two Names of Baptism; so
 it cannot be averred to be one and the same person. Secondly,
 for that this Outlawry in this Suit (which is only by way of
 Discharge, and to recover nothing) is not pleadable. But af-
 ter Argument at the Bar, it was adjudged for the Defendant.
 First, that they be but one name; for so it appears by Peirs Ga- ^{Verflegan 307.}
 veston who is so named in some Acts of Parliament, and in others ^{Post. 477.}
 Peter Gaveston. And yet it is well known that both of them
 were meant of the same person: And the Chief Justice said, that
 where one was sued by the name of Sanders, and his Name ^{2 Rol. 135.}
 was Alexander, yet it was held to be well enough: So. Joan ^{Moor 411.}
 and Jane are both one Name; but Agneis and Anne, Gillian and ^{3 Cr. 176.}
 Julian are different, ^{29 Aff. 16.47. 7 H.6.39. 46 Ed.3.3.22. 4 Ed. 3. fol. 128. 6 Ed. 4. 9.} Secondly, that it is not well pleadable
 in this Suit: For a person outlawed is not receivable to sue
 in any Court, unless it be to reverse his own Outlawry; ^{3 Cr. 448.}
 For the Chief Justice said, that where the Action is ad lucran- ^{Post. 616.}

dam, there ought to be ability in the person : And it is all one to gain by way of discharge, as by way of perquisition, Glanvil lib.2. cap. 3. *ut legatus legem terræ amittit*, Britton. *Respondra a tous, mes nul respondra a luy* ; And Bracton to the same intent. 6 Ed.4.9. Wherefore it was adjudged for the Defendant, and that the Plaintiff should take nothing by his Writ.

Sayrs Case.

(12)

UPon a Fieri facias to Sayre Under-Sheriff of the County of Buckingham, who sold the Goods of a poor man Defendant for 22 l. 13 s. 4 d. the Goods being well worth 80 l. And it appeared to the Court, that the said Sayre had perswaded the Jury to prize the Goods at an undervalue, perswading them it would be better for the poor man ; Whereupon they apprized them *ut supra*, and he delivered them to the Plaintiff for the said sum : The Court held, that it was Oppression, and inquirable at the Assises by Endicement, or punishable in the Star-Chamber ; And the Court commanded that the Under-Sheriff, being an Attorney, should be brought before them.

Termino

Termino Trinitatis,
Anno decimo quinto JACOBI Regis
in Banco Regis.

Sir William Brunkard *versus* Segar.

Action for words; Whereas the Plaintiff was one of the Privy-Chamber to the King, That the Defendant spake of him these words, Thou art a Cozening Knave, and livest by Cozenage: After Verdict, upon Not guilty pleaded, and found for the Plaintiff; It was moved in arrest of Judgment, that these words were not actionable, for they be too general; And precedents were shewn, that for such words Actions being brought, Judgment hath been stayed, Hill. 26 Eliz. betwixt Kirby and Wallis, & 31 & 32 Eliz. between Middlemore and another; But a precedent was shewn, that one Holbeack Coroner of Warwick brought his Action for these words, Thou art a Cozening Knave-Coroner; And it was adjudged for the Plaintiff: But in this Case Montague held, the quality of the person is to be considered, being employed about the King, to say that he lived by Cozening is a great discredit; But of every Common Person, these words be not such a slander as the Law will punish: The other Justices doubted thereof, and willed that precedents should be searched. (1)

Moor 261;
3 Cr. 95;
1 Cr. 516;
3 Cr. 95;
Post. 619;

Dutton *versus* Engram, Pasch. 15 Jac. Rot. 204.

Replevin: Upon Demurrer the Case was such, William Goldwell seised of Lands in Fré, in Chard, holden in Socage, devised them to his Feme for life, and after her to John his eldest Son, and to his Heirs, upon condition that he, as soon as the land should come unto him in possession, should grant to Stephen his second Son, and his Heirs, an annual rent of 4 l. out of the said Tenements; And that if the said John died without Heirs of his body, that the Lands should remain to the said Stephen, and the Heirs of his body, &c. and died; The Feme entred and died; John in 4 Eliz. entred and granted a rent of 4 l. per annum to Stephen and his Heirs, out of the said Lands, with clause of distress; Stephen granted that rent to Engram, to whom John attorned; Afterwards John dying, Stephen entred, and in 39 Eliz. infeoffed Sir William Wythers, who let to the Plaintiff, and for the Rent of two years behind in 2 Jac. this Distress was taken; and all this matter being disclosed by the Adowry, and War to the Adowry, it was demurred: The first question was, (2)

1 Rol. 388. 422;
842. 938.

was, whether John had an Estate in Fee by this Demise at the time of the grant of this Rent; Because the Demise was unto him and his heirs upon condition that he should grant a Rent to Stephen and his Heirs, whereby the intent was shewn that he should have a Fee; Otherwise he could not legally grant such a rent to have continuance after his death: But it was resolved to be an Estate Tail; For being limited, that if he died without Issue; that then it should be to Stephen and his Heirs of his body, that shews what Heirs of John were intended, (viz.) Heirs of his body; But yet by the limitation of the Will, he is to make this grant of this rent, which being by the appointment of the Donor, it is not *Contra formam donationis*, but stands with the gift, and shall bind the Issue in Tail. Vide 35 Aff. pl. 14. 37 Aff. pl. 15. Dyer 122. & 190. and the case of *Web versus Herring*, ante pag. 415. Secondly, admitting that John Goldwel was Tenant in Tail at the time of this grant, remainder to Stephen, whether this grant of the rent shall endure longer then the Estate made to John shall endure. For it was objected, That being extracted and granted out of the estate of John to Stephen who had the remainder, it shall endure longer than the estate of John who granted it; And his estate being determined, out of which the Rent was granted, the rent is also determined; For he had not any power to charge more than his own Estate; And the intent of the Demisor doth not appear that he should be charged longer, because it is appointed to be granted to him in remainder; Therefore it is not intended that it should endure longer then the particular Estate Tail; And it shall inure as a grant to one and his Heirs, as long as J. S. hath Issue of his body, and he being dead, the rent is determined: But it was resolved, that this was a good grant of the rent in Fee, issuing out of all the Estate and not out of the Estate Tail only, and being guided by the directions of the Will, it shall take according to the limitation thereof, and charge all the Inheritance: Wherefore it was adjudged for the Abowant.

Ante 415.

I Cr. 103.

Tesmond versus Johnson, Trin. 15 Jac.
Rot. 199.

- (3) **A**ction *sur Trover*, of Goods, and supposeth, That 3. Maij, 14 Jac. he was possessed of those Goods, and the same day lost them; And that 4. Maij, Anno 14. supradict. They came to the Defendants hand by *Trover*; And that postea, viz. primo Maij, Anno 14. supradict. he converted them: And it was found for the Plaintiff, and now moved in arrest of Judgment, that this Declaration is not good; for the Conversion is alledged before the *Trover*, which cannot be, and therefore void: Sed non allocatur; But it was adjudged, that postea convertit, is sufficient, and

Post. 550. 618.
620
Ante 97.

and the scilicet is void : And a president was then shewn in an Ejectione firmæ, where the Ejectment was alledged, That postea, scilicet, such a day which was before the Lease ; And it was found for the Plaintiff, for the scilicet being repugnant, is void ; And the postea ejecit was held good enough : Whereupon it was here adjudged for the Plaintiff.

Note, That where a Record is moved out of the Kings Bench, by a Writ of Error into the Exchequer-Chamber, It is not any Record in Court until the Error be determined ; And if there be any mistaking by the negligence of the Clerk in the Transcript, the course then is to send for the Clerk of the Court, and to amend it in the Exchequer-Chamber : But if the principal Record which remains in Court be false, Then to amend it, and thereupon to alledge diminution ; And upon Certificate thereof, the Transcript shall be also amended, if it appear to be but the negligence of the Clerk only.

IF a man plead by force of an Indenture which is lost, and Affidavit made thereof, the party shall be compelled by the Court to shew his Counterpart, and he to plead thereto, or otherwise the Court may grant an *Imparlane* ; So it is, if he will depose that he never had any counterpart.

UPon a Rule given in the Common Bench for a Prohibition, the party laid by his Prohibition ; And the Ecclesiastical Court proceeded to Sentence : Afterwards the party appealed, and two Terms after the other delivers Prohibition ; The Court held, in regard he had surceased his time, and suffered the sentence to pass, that he now should not have the benefit of the Prohibition ; And a difference taken where a Prohibition was granted, and the party not serving it, Sentence of Excommunication is pronounced in default of answer ; there upon the matter he may have the benefit of his Prohibition, but not where there is a Sentence definite.

A Prohibition prayed to the Spiritual Court upon a suggestion, That the Parson libelled for Tythes of a Mill which was erected upon Land discharged of Tythes by the Statute of Monasteries, 31 H. 8. cap. 13. And denied *per totam Curiam, for de molen-dino de novo erecto non jacet prokibitio.*

Hampton versus Wild.(8)
1 Rol. 641. 2.1 Cr. 237.
Post. 576.

Prohibition awarded to the Spiritual Court; for that Hampton, Parson of Thimblethorpe sued Wild in the Spiritual Court, because the said Wild had let a certain Close, reserving Pasturage for his saddle Gelding; And the Parson sued him for Tythes to be paid of things renovant; But this horse being only for labour and travail, would not renew: Otherwise it had been if he had kept an horse to sell, whereby profit had been accrued, there he should have paid Tythe. Houghton contra in the principal point; Because by the Pasture he may increase profit; and so it is a profit *Ratione fundi*, as in case of barren Cattel: He ought to alledge further, That they were used to labour; And by all the three Justices, if he had averred in the surmise, that he used the horse for labour, the Prohibition had lain.

Millers Case.

(9)

Ante 144.
3 Cr. 648.
Hob. 219.

Action upon the Case by Miller and his wife, for these words spoken against his wife; Mrs. Miller is a whore, and hath had the Pox, and hath holes one may turn his finger in them; Mr. Ring the Apothecary gave her drink for it, and therefore take heed how you drink with her: And it was moved that the words were not actionable; And Coke 4. 17. Jeaneys Case, 39 & 40 Eliz. Lambs case was cited in proof thereof: But all the Court held, that the Action well lay; And Taylor and Bancks case adjudged accordingly, Thou art a Leprous Knave, Hill. 40 Eliz. inter Davis & Taylor, he is laid of the Pox; & 33 Eliz. Backsters Case, Thou wast laid of the Pox.

Searles Case.(10)
Hob. 121. 288.
2 Rol. 222.

Hob. 294.

Hob. 294. 288.

Prohibition was prayed by Richardson Serjeant; For that Searl Parson having been convicted of Homicide, and allowed his Clergy, was now sued in the Spiritual Court by libel; That whereas he was convicted of Homicide, &c. It should be a cause to deprive him of his Benefice; And he cited a president, Mich. 27 & 28 Eliz. in Com. Banc. Rot. 2574. where a prohibition in like Case was awarded: But per totam curiam, no prohibition ought to be granted: And Montague chief Justice said, That although the Statute of 18 Eliz. cap. 7. ordains, that after Clergy the party shall be set at large, and shall not be put to his Purgation, yet that doth not disaffirm the Judgment; Whereunto Croke and Doderidg accorded: As to the objection, That the Libel in the Spiritual Court was not against him as an Homicide; The Court held, that it was so much the better: For if it had been so, a Prohibition ought to have been grant-

granted; But it is, Quod convictus fuit de homicidio, as it ought to be: For without Conviction is no cause of Deprivation; And if it were against him as an Homicide, it should be contrary to the Verdict given: But here they proceed only to deprive him by reason of his Conviction, and so do thereby affirm the Verdict: And as to the Objection, That in as much as the Statute of 18 Eliz. hath disabled him that he shall not make his purgation, he shall now be taken to be as if he had made his purgation before the Statute; and before the Statute, he could not then have been deprived. It was answered, That anciently by the Conviction he was to undergo two Punishments, the one of Death, the other of Defamation: And that the first was discharged by allowance of Clergy; *Pœna potest dirimi, culpa perennis erit.* Afterwards by a General Council, Quod Clerici non tradentur manibus judicis temporalis; which Council in the time of Thomas de Becket was by Usurpation received here in England, and so far prevailed, that if any such person prayed his Clergy, and was delivered to the Ordinary, they then re-examined him by twelve Spiritual Persons; and if he were acquitted, he should not be deprived. Vid. Linwood Canonica purgatio secunda. And this Trial by twelve Clerks was not but de credulitate, so as the first Conviction remained. Vide the Statute of Westminster 1. cap. 2. And the purgation did not disaffirm the Verdict: For he is delivered to the Ordinary by the Judgment of the Common Law, and the Entry thereof is, Quod traditur Ordinario, &c. And the Law was, that if he did not make his purgation, he ought to remain perpetually in Prison, and have slender Diet, viz. every day Bread and Water only; and if the Ordinary refused to accept of his purgation, then he might have a Command to the Bishop to do it: And Note, that the Writ is, *satis habetur suspectus.* Vide Nat. Br. & St. Cor. 137. 138. So as the Statute of 18 Eliz. cap. 7. doth not make any purgation for the taking away that which was before; and the purgation before the Statute did not defeat the Verdict, but affirmed it: And it is a Rule, not to grant a Prohibition where the proceedings in Ecclesiastical Courts are not against the Law of the Land, nor the Liberty of the Subject: And so the prohibition was denied per Curiam. Vide Hunns Case, Kellaway. 7 H. 8. 181.

Hob. 291.

Co. 5. 110. 2.

Hob. 291. 2.

Stamf. 134.

Hob. 291.

Hob. 121.

Hob. 288.

Weston *versus* Dobniet.

(11)

Ante 191.

Ante 134.

Ante 90.

Action *sur le Case*: Whereas suit was in the Spiritual Court, betwixt one A. and the Defendant, wherein A. produced the now Plaintiff for a witness: The Defendant having day given to except against the Witnesses, put in his exceptions in writing; That the now Plaintiff was not a competent witness, and that there ought not any credit be given unto him, because he was perjured; whereupon the Plaintiff, hanging this suit, brought this Action for this scandal: And it was argued that it lay; But the whole Court held (upon the reason in Dixies Case, Cok. 4. 14.) that it was not maintainable, because it is in course of Justice, and not ex malitia: For if one brings another before a Justice of Peace for supposition of Felony, without any just cause, yet no Action lies, and if one exhibits a scandalous Bill, if the Court hath Jurisdiction of such matters, an Action lies not; Otherwise it is, if the Court have not Jurisdiction, or having, if the party publish his Bill abroad, the said Bill being false: But in this Case the Defendant proceeded in such manner as the Spiritual Court hath allowed him, viz. to disprove the Testimony of the Witnesses produced. And Houghton said, if in Trespas the Defendant justifies that the Plaintiff was a Bankrupt, whereby he had a Commission upon the Statute, and those goods were delivered unto him, whereas the Plaintiff was not any Bankrupt, nor any Commission issued, yet the Plaintiff for the words contained in the Plea shall not maintain any Action: And he put the Chief Justice in mind of Brooks Case against the Recorder of London, who in evidence to a Jury spake scandalous words against one; And yet adjudged that no Action lay: So per Curiam Judgment was here for the Defendant.

..... *versus* Henning.

(12)

1 Rol. 463.
Hob 51.
Folst. 472-493.
684.

Assumpsit: Henning bought two weighs of Barley, and assumed to pay for them as much as the Plaintiff should have of any other, abating a penny only in every Bushel: The Plaintiff shews that he sold to J. S. after this agreement two weighs of Barley for 18 l. which (abating the one penny in every Bushel) amounted to 17 l. 10 s. and thereupon brought his Action: And because it did not appear in the Declaration that notice was given to the Defendant, that J. S. had given 18 l. the Judgment was arrested; And for the same reason a Judgment was reversed betwixt Twist and Holms; And this difference taken, If the agreement be, that he shall pay so much as J. S. in particular payed; In that Case, Quia constat de persona, and he is indifferently named betwixt them, the Defendant at his peril shall inquire of him, and the Plaintiff is not bound to give notice:

But

But when the person is altogether uncertain, there the Plaintiff to intitle himself to the Action, ought to give notice; And Houghton cited this Case to be lately adjudged, One assumes to save harmless J. S. of all Obligations wherein he shall be bound for J. N. And in an Assumpsit brought, he shews that he was bound in an Obligation for J. N. from which he was not saved harmless, and doth not shew that he gave any notice to the Defendant; Yet held to be good enough. Ante 288:

K k k

Termo

Termino Michaelis,

Anno decimo quinto J A C O B I Regis
in Banco Regis.

Richard Brooks *versus* Eliz. Brooks & Will. Wright,
Hill 13 Jac. Rot. 1911.

- (1) **E**jectione firmæ, of Lands in Welborough, of a Lease of John Wright : Upon Not guilty, It was found by special Verdict, That John Wright Father of the Lessor, was Copyholder in Fee of this Land of the Mannor of Welborough, and surrendred it into the Lords hands, who regranted it in this manner ; Memorandum, Quod *John Wright* cepit de Domino Ceux terr. cui Dominus concessit, inde seisinand. Habendum eidem *Johanni & Elizabeth uxori ejus, & hæredibus eorum de corporibus suis exeuntibus*, Remanere to the said John Wright ; The said John Wright dies, the Lessor as his Heir enters ; And if the said Eliz. shall take by this Copy, they pray the discretion of this Court ; And then find for the Defendant ; if otherwise for the Plaintiff : And upon this argument at the Bar it was adjudged for the Defendant ; For although there be no words of grant in the Copy, nor is there any grant to the *Feme*, but an Habendum only, yet it was held good enough : For the intent of the Lord appears that both should take, and there is no more granted to the *Baron* then to the *Feme* ; For there be not any words of grant to the *Baron*, but Cepit de Domino, cui Dominus concessit seisinam. But all the words of grant and limitation are in the Habendum ; And in many Mannors there be no other forms of grant or limitation, and in the 4 Ed. 3. 11. where a gift was made to *Baron*, Habendum simul cum his *Feme* in Frank-marriage, she being the Lords Kinswoman, it was adjudged to be good, although they were not named before the Habendum : wherefore it was adjudged for the Defendant, Ed. 3. Dy. 8. 59. 160.

Holms *versus* Broket; Hill. 14 Jac.

- (2) **E**rror of a Judgment in the Common Bench ; The Error assigned, For that in Debt upon an Obligation, the condition being for the payment of 60 l. upon the 25th of June, 12 Jac. at his house in Fleetstreet : The Defendant pleaded, that he paid the
foze-

*12. It was said by Holt in
this case in his argument of this
& Wigg Hillery
must be by Value of some
at Common & because of
and Copyhold, for it is not
issue of a surrender of a Copy
hold, but a surrender of a Copy
Co. Lit. 21. a.*

foresaid sum of 60 l. the 20th day of June, Anno 12 Jac. at the said House, secundum formam & effectum indoramenti prædicti: The Plaintiff replies, That he did not pay it the foresaid 20th of June, &c. and Issue thereupon, and verdict found, that he did not pay it the foresaid 20th of June, and Judgment thereupon, and Error for that cause assigned, for the Issue is taken *dehors* the matter of the condition; and so an ill Plea, and void Issue; For it may be true that he did not pay it the 20th of June, yet it may be paid upon the 25th of June; And although it were shewn to be an ill plea, yet it shall be aided by the Statute of 32 H. 8. But it was resolved that it was not aided, for it is merely void, and no Issue, being found for the Plaintiff; For it may be that the Obligation was not forfeited, notwithstanding this verdict; but if the verdict had been found for the Defendant, that the payment was the 20th of June, peradventure the verdict had made it good, as in the Case betwixt Chamberlain and Nichols, Coke lib. 5. f. 43. For payment before the day is good payment at the day, and the Plaintiff hath not cause of action; But non-payment at the day before the true day in the condition is not a non-payment at the day; For it may be that he paid it upon the 25th day, although it were not paid before: Wherefore the Judgment was reversed.

3 Cr. 144.

1 Cr. 54.
Post. 442.
Hob. 113.

Ante 377.

1 Cr. 284.
Co. Lit. 212.b.
Moor 267.

Johns *versus* Wilson.

TRESPASS, Quare clausum fregit, & spinas suas ad valentiam succidit; After Verdict, upon Not guilty, and found for the Plaintiff, it was moved in arrest of Judgment, that the Declaration was not good, because he doth not shew the quantity of the loads or load, and so it is uncertain, as in the case Cok. 5. fol. 34. Playters Case, Tresp. quare pisces suas cepit; And of that opinion was the Court, but they would advise: Afterwards being moved again in the end of the Term, many presidents were shewn for the maintainance thereof; Wherefore it was adjudged for the Plaintiff.

(3) 1 Vent. 272. 329.

1 Cr. 573.

Wykes *versus* Sparrow, Trin. 15 Jac. Rot. 774.

EJECTIONE firmæ, of two Closes called higher Gulwell and lower Gulwell, containing three acres of Land: After Verdict, upon Not guilty pleaded, and found for the Plaintiff, it was moved in arrest of Judgment, because it was not shewn what every Close contained, or whether it were arable, or what other Land; and the words, containing three acres of Land, do not contain any certainty; and for that purpose Savils Case, Coke 11. Rep. fol. 55. was vouched: But it was answered, that this differed from that Case, for there is neither quantity nor quality of the Land; But here the quality of the Land is mentioned, and a President was shewn, Trin. 10 Jac. Rot. 1338. or 1339.

(4)

1 Cr. 555.

K k k 2

That

3 Cr. 555.

That in Ejectione firmæ, for the site of a Mannor, and three Closes by name, upon demurrer upon the Declaration, it was adjudged for the Plaintiff: But it was thereto answered, that that Case was not much argued, and it was before Savils Case, and after it was twice moved at the Bar, Montague, Croke, and Doderidge delibered their opinions for the Plaintiff; For containing three acres of Land, and the Closes being named, it is certain enough what nature of Land it is: And they agreed, that although the Closes contain more, yet he shall recover the whole Closes. But Houghton was strongly against it, that an Ejectione firmæ lies not of a Close, as it is held in Savils Case; and the containing three acres of Land do not add any more certainty thereto, and therefore it is altogether uncertain: Wherefore, &c. Notwithstanding his opinion, it was adjudged for the Plaintiff.

Page *versus* Keble.

(5)
Hob. 283.
Ante 158.
Ante 190. 204.
3 Cr. 185.

Action for these words, Thou art perjured, for thou art forsworn in the Bishop of Gloucester his Court: After Verdict it was moved, that an Action lay not for these words, and of that opinion was the Court. And gave rule for Judgment accordingly.

Stepheris *versus* Keblethwayt, and others.

(6)
1 Rol. 318. 20.

Replevin, for taking three Cows apud Blewberry: The Defendant cognovit captionem, for that the place where is parcel of the Mannor of Blewberry, being waste ground, and that there were 100 Copyholders there, who had Common in that place; and shews a Custom, that they chose every year a Surveyor of their fields, who used to distrain their Cattel *Damage fesant*; And shews that he was elected Surveyor according to the Custom, and found the Cows there, *Damage fesant*; Whereupon cognovit captionem, and prayed return: And it was thereupon demurred, and afterwards adjudged, that this Abowry was not good; For although peradventure they had such a custom to make Surveyors of their fields, and that they might distrain *Damage fesant*, yet, that ought to be in the name of him who hath the Freehold, and of some Commoner, but not in his own right; and so ought the Common Pounder: But peradventure that cannot be any good cause of justification, to make an abowry to have return. Wherefore it was adjudged accordingly.

Ante 208.

Worledge *versus* Benbury, Trin. 15 Jac. Rot.

(7)
1 Rol. 330. 1.
2 Rol. 52.

Ejectione firmæ, of a Lease of John Woodson of Lands in Southpeterton: Upon Not guilty, a special verdict was found, that

that it was Coppbold Land parcel of the Mannor of Southperton, demisable for three lives; and that by custom of the Mannor; the first name in the Cope shall enjoy it only during his life, Et sic successive; And that the Lord Arundel of Wardor granting it by Cope to Alice Wested, Robert Wested, and John Wested her Sons for their lives; That Robert made waste in cutting down divers Timber-trees growing upon it, which was presented by the homage for the Lord Arundel, who seised it, and granted it by Cope to J. Wardeston the Lessor for his life; And after licensed him to let Tenementum infra scriptum in quibus, &c. for five years, if John lived so long; That he let to the Plaintiff for three years, who entred, and the Defendant ousted him: Et si super totam materiam; and it was hereupon moved for the Plaintiff, that inasmuch as it was a good Lease made to the Plaintiff, and no title at all appears for the Defendant; But that he entred upon the Plaintiffs possession, and not by the command of any who had right, although there were some matter betwixt the Plaintiff and the first Coppholder, yet Judgment ought to be found for the Plaintiff: And of that opinion was all the whole Court. Vide Co. lib. 5. fol. 97. Goodals Case: But it was then moved, that the Lease found to be made to the Plaintiff, was not good; for it was made by the Lords license, where-
 Ante 64.
 by he was to make a Lease for five years, if John Woodston lived so long, and he let it for three years without any limitation: Sed non allocatur; For the license being to make it for five years,
 2 Rol. 330.
 the three years are therein comprised: And this being betwixt the Plaintiff and the Lord of the Mannor, the said Lord if he will, may question him for it; but it is not material to the Defendant: Also as it is without limitation it is not material; For the licence is granted to the Tenant for life, and this condition is no more then the Law appoints; And the Lease without any such limita-
 2 Rol. 331.
 tion should determine by the death of the Lessor, and therefore not material: But if it had been with a limitation, if J. S. had lived so long, that peradventure had been material; wherefore it was adjudged for the Plaintiff. But as to matter in Law, nothing was spoken thereto.

Sanders versus Sandford.

DEbt upon the Statute 2 Ed. 6. for not setting forth Cythes; (8)
 And declare, that the Plaintiff was seised in Fee of a portion of Cythes of Corn and Hay growing upon such a Gange, whereof the Defendant was Occupier: And that the Defendant was Occupier of forty Acres of Land sown with Wheat, Rie and Barley, and reaped the Corn and carried it away, without setting forth of Cythes; and that the Cythes were worth 40 s. and the treble Damages 6 l. For which he demands 6 l. Ap-
 on

Ante 328.

on Nil debet pleaded, it was found for the Plaintiff, and moved in arrest of Judgment, that the Declaration was not good; For he entitles himself to a portion of Cythes being a lay-person, and he doth not shew how; And it being a profit in another soil, he ought to make a good title to himself; as that it was parcel of the possessions of such an Abbey, or spiritual Corporation, who might lawfully have them, as 7 Hen. 6. Dyer Sed non allocatur; For this Action is grounded upon the Tort, for not setting forth of the Cythes; For which he demands the penalty of the Statute, and the seisin in Fee is but a conveyance; and for this Action he needs not to make a Title; and therefore it is usual, that the Plaintiff brings the Action as Firmarius vel proprietarius, without shewing any particular Title: And it differs from their case of assignment of Cythes; For there he ought to make good Title: And in Debt upon a Lease for years, there needs not any Title to be shewn, as 21 H. 7. Wherefore, &c. Secondly, it was objected, that it is not good, because he doth not shew what was the quantity of every grain in specie, as the usual course is; For it is here altogether incertain, and the Court knows not how to judge thereupon: Sed non allocatur; For he shews what the Cythes were worth, which is the wrong supposed for the carrying them away, which is sufficient: Wherefore it was adjudged for the Plaintiff.

Eliz. Gardener versus Thomas Spurdant, and Francis his Wife.

(9)

Action for words: Whereas one George Gardiner her Husband died by the visitation of God, 1. Feb. 13 Jac. That the Defendant Frances said of the Plaintiff, 2. Feb. 13 Jac. Thou hast poisoned thy husband, innuendo the said George Gardiner, and I will justify it: And afterwards she said to J. Monox of the Plaintiff, Goodwife Gardiner hath poisoned her husband, and I will justify it, and have told her so much to her face. The Defendant pleaded Not guilty, and found for the Plaintiff, and moved in arrest of Judgment that the Action lies not. First, because it is not said, that she voluntarily poisoned him, nor when she poisoned him, nor that he died of the poisoning; and otherwise it is not felony: And for that purpose was vouched Barhams Case, Co. 4. fol. 20. & ibid. 44. Vaux Case: Sed non allocatur; For when it was shewn that the Plaintiffs husband was lately dead, and the Defendant said the Plaintiff had poisoned him; It is a great scandal; she also chargeth her with poisoning unto death: wherefore it was adjudged for the Plaintiff.

Ante 306.

Mayho versus Buckhurst.

(10)

Error of a Judgment in the Kings Bench, in a Writ of Covenant brought against him as Assignee of one Tho. Mayho; For

For that the Lessee covenanted to pay annually during the Term of 21 years 20 s. to the Churchwardens of St. Saviours in Southwark, and to repair the Houses and leave them well repaired at the end of the Term: And because the Assignee did not pay the Rent, nor repair the said Tenements, the Action was brought; and Judgment being given upon a Nihil dicit, and entire Damages found, it was adjudged for the Plaintiff; And now Error assigned, because the Assignee is not chargeable with this Covenant of the payment of an annual sum, but it is a meer collateral Covenant: Also it is well not assigned, for it is not shewn for what time the sum was arrear; And all the Justices and Barons held, that this Declaration was not good for both causes; and therefore the Damages being entire, the Judgment was reversed.

Co. 5. 16. b.
1 Cr. 207.
Poll. 500.

Euley versus Sloley, Trin. 12 Jac. Rot. 983.

Error of a Judgment in Trespass, and false Imprisonment in the Kings Bench: The Error assigned, because in Trespass of Battery and false Imprisonment, The Defendant as to the Battery pleads Not guilty, and as to the Imprisonment justifies: Whereupon it was demurred, and it was adjudged that the Plea was ill; wherefore the Plaintiff prayed his Judgment thereupon, and a Nolle prosequi was entered for the residue, and he had Judgment accordingly: And because as to the Nolle prosequi, Judgment was not entered, quod eat sine die, so as there was not any discharge made for the Defendant, it was alledged to be erroneous: But it was held clearly, that where there be two Defendants, and the one pleads Not guilty, and the other pleads another plea, whereupon it is demurred, and Judgment for the Plaintiff against him who demurred; and a Nolle prosequi for the other, there of necessity it ought to be sine die, otherwise it is ill: But where it is against one, there the Presidents are both ways: Wherefore the Judgment was affirmed.

(11)
2 Rol. 100. 34.
Hob. 180.

Hob. 180.

Wood and his Wife versus Doctor Suckling.

Error of a Judgment in Norwich in an Action of Trover of Goods, against the said Wood and Anne his Wife of the Trover of the *Feme*, and conversion of the *Feme* during the Coverture: The Defendants pleaded Not guilty, and found against them for part, and for the other part, it was found for the Defendant; And the Judgment was, quod querens recuperet his Damages found, and that the Defendant Anne sit in misericordia; and that the Plaintiff pro falso clamore quoad residuum unde defendentes acquietati existunt, sit in misericordia: The Error assigned; First, because the Judgment is, that the *Feme* sit in misericordia,

(12)

Co. 9. 73. a.

Ante 203.

cordia, whereas it ought to be, that the *Baron* and *Feme* sint in misericordia, for she cannot pay it without her husband; Also because the *Baron* pleads with the *Feme*, and doth not confess the Action, for that is the cause of the misericordia; Also the usual course is in Actions against *Baron* and *Feme*, for Trespals done by the *Feme* during the Coverture, if they be thereof convicted to have the Judgment, Ideo Capiantur, against both, yet there is no offence by the *Baron* himself: And all the Clerks affirmed, that so was their course. Another Error was assigned, because the Judgment is not quod defendens eat sine die. And for both causes it was held to be erroneous, but principally for the first; Wherefore Judgment was reversed.

Bedo *versus* Sanderfon.

(13)

Post. 508.

INformation in the Exchequer; For that the Defendant per viam corruptæ bargan. & chevianſie fac. betwixt the Defendant and one Edward Hayns received of one John Hayns Administrator of the said Edw. Hayns betwixt the 23. June, 14 Jac. 65 l. (viz.) for the use and Occupation of an House in Clerkenwell in the County of Midd. from Midsummer 14 Jac. unto Mich. 14 Jac. 15 l. Et pro absentione & detentione solutionis 1000 l. from the 16. April, 1614. for six months then following 50 l. Ubi revera prædict. messuagium adtunc valebat dimittendo per annum 20 l. & non ultra; and therefore he demanded three thousand pound, being the treble of the value of the 1000 l. so forborn, After Verdict for the Plaintiff, upon Not guilty pleaded, it was moved in arrest of Judgment, that this Information was not good. First, because he doth not shew the certainty what the bargain was, but generally, per viam corruptæ, &c. Sed non allocatur; for it was said, that so was the usual course in the Exchequer, being grounded upon the receipt; And that is to be proved in evidence: But it was agreed, that in pleading to avoid a Bond or an assurance, it ought to be particularly pleaded and shewn, for the party is privy to the manner of his Contract, but the Informer is not privy thereto, and therefore it sufficeth him to shew the particulars upon the Evidence. Secondly, because it is not shewn, that the House was not worth above 20 l. per annum at the time of the bargain; For peradventure by Fire or Tempest it may fall, in toto, vel in parte, so as at the time of the receipt it was worth but 20 l. And here adtunc valebat cannot be referred to the time of the bargain; For there is no time laid thereof; but there be three times alledged, (viz.) betwixt the 23. June, 14 Jac. Secondly, the occupation of the House from Midsummer to Mich. Thirdly, the forbearance of the money from 16. April, 14 Jac. for six months following; and then it is said, ubi revera messuagium prædictum adtunc valebat, &c. So it is uncertain to which of those times adtunc refers; and if it should refer to the last

As properly adtunc always refers to the last antecedent, as 28 H. 8. 19. Dy. Bolds Case is, that it ought to be so expounded : Then this is no offence, and it is uncertain to which of the times it shall refer, and so the Information is not good ; for the Defendant ought to be certainly and precisely charged, who is to be Fined and Imprisoned, and not by Argument and Implicitly : And Presidents were shewn, that in such Cases the usual course is, to alledge it to be of such a value and no more, at the time of the bargain, when the want of the value of the House is the sole offence and *Chevisance* which is pretended ; And for that purpose were cited Presidents in the Exchequer, Trin. 43 Eliz. Rot. 102. betwixt Harrison and Bagshaw ; and Mich. 43 Eliz. betwixt Farnaby and Beth ; and Trin. 3 Jac. 132. and Lovedayes Case in the new Book of Entries ; wherefore it was prayed that the Defendant might be discharged : And after Argument at the Bar by the Attorney-General, and Serjeant Chiburn, in maintainance of the Information, and by Thomas Crew and Dampart, and George Croke for the maintainance of the Exceptions, It was adjudged for the Plaintiff. Vide 4 & 5 Ph. & M. Dy. 16. Fox Case, Plowd. Comment. 202. Stradlings Case, & ibid. 193. 3 Ed. 4. 21.

Co. Lit. 303. a.

Cotton *versus* Westcot, Cujus principium ant. fo. 420.

This Case was now argued at the Bar, that it was not Error ; For although an Infant may not appear by Attorney, being Defendant or Plaintiff, in Actions brought in his proper right, and if he appear by Attorney it is Error, and may be assigned for Error, although he were of full age at the time of the Writ of Error brought, yet against an Infant Executor, who represents the person of his Testator, who was of full age, and may pay Debts and Legacies, and receive them, and make acquittances, and be outlawed in his person, there is no disability, but that he may well appear by Attorney ; And Presidents were shewn in Court, viz. Trin. 38 Eliz. Rot. 144. betwixt Bear and Starkey, where an Infant sued by Attorney, upon a Debt as Executor, and Error assigned for this cause, and ruled to be no Error : But the Judgment was afterwards reversed. Note, " it was also so adjudged, *Pasch.* 37 Eliz. Rot. 251. betwixt Bartholomew and Dighton : But it was thereto answered, and so resolved by the Court ; That an Infant being sued, and pleading by Attorney, although he be Executor, yet it is erroneous ; for being su'd, he may by a false plea be charged *de bonis propriis*. And although he pleads truly, he shall be charged in Damages *de bonis propriis* ; and by intendment he cannot instruct his Attorney to plead ; And " a Guardian is always made, that he should answer the Infant if he plead ill, wherefore law and reason require, that although he be an Executor, yet he ought to appear by Guardians ; and therefore difference was taken, where an Infant Executor is Plaintiff, and where

(14)
1 Roll. 796.

Co. 5. 27. b.

3 Cr. 541.

3 Cr. 424.

Post. 641.

“ he is Defendant, and being Plaintiff where he recovers ; for if
 “ Judgment be given against him where he is Plaintiff, it seemeth
 “ all one with this case ; And so was the opinion of the Justices, and
 “ for that reason it was reversed ; and it was said, that an Attorney
 “ may plead *non sum informatus* ; but a Guardian cannot. Vide Co.
 “ 8. 58. b. *Beechers Case*.

Harrison versus Metcalf.

(15)
 1 Rol. 672.

Ante 435.
 Post. 54.
 Ante 183.
 Ante 64.
 Ante 221.
 Post. 640.

3 Cr. 605.
 Ante 64.

R Eplevin : The Defendant avows for Rent of 20 l. supposing that Major Vavafor was seised in Fee of the place where ; And in 28 Eliz. granted a Rent of 20 l. per annum ; and for the Rent arrear Anno 12 Jac. he avows, &c. And upon Issue Non concessit, the Jury found a special Verdict, That Will. Vavafor was seised in Fee, and let that Land, Anno 23 Eliz. to Major Vavafor for 21 years, and he so possessed granted that Rent ; Et si, &c. And upon this Verdict, although the Issue be found quod concessit, and so it is for the avowant, yet because it appears that the Estate out of which the Rent is granted, was determined long time before the distress taken, so that he had not any title to avow, It was held that Judgment should be for the Plaintiff, although the Issue was found against him. Secondly, it was moved in arrest of Judgment, that the Ven. fac. bare Teste 26. Jul. which was the last day of Trin. Term, and so the return is before the Teste, and the Distingas ill awarded : But it was resolved, that inasmuch as it is but a default in the judicial process, it should be amended : wherefore it was appointed to be amended, and Judgment was given for the Plaintiff.

Turner versus Champion.

(16)
 Post. 457.
 Hob. 331.

Ante 40.

A ction for these words, Thou hast stolln my Corn, and carried it to Market : It was moved in arrest of Judgment, that the Action lay not ; For it might be Corn growing, and then it is no Felony ; and words shall be taken in mitiori sensu : Sed non allocatur ; for it shall be intended according to the common sense, Corn in the Barn, not in sheaves, whereof a quantity cannot be taken, and carried to market : Wherefore it was adjudged for the Plaintiff.

Wife versus Bellent.

(17)
 1 Rol. 318.

R Eplevin : The Defendant avows, because that his Ancestor was seised in Fee, and let the Land in quâ, &c. for years, rendering Rent, and for Rent due to him and his *Feme*, in right of his *Feme*, he avows the taking : After Verdict for the avowant, upon a collateral issue, exception was taken in arrest of Judgment, because the *Baron* sole avows, and he doth not joyn his *Feme* with him ; whereas it appears, that the Rent is due
 to

to him and his *Feme*, so he ought not to abow in his own name only; But because he shewed the truth of the matter as it is, and did aver the life of the *Feme*, and so the distress well taken by him, and the Rent due unto him. It was adjudged that the Aboway was good enough. *A Award is put on this Case. 1 Roll. 318.*

Churcher versus Wright.

A Skumpfit: After verdict for the Plaintiff, it was moved in (18)
arrest of Judgment, that the Distringas was blank, and no return thereupon, nor name of the Sheriff added or put thereto: But because the Ven. fac. was well returned, with the name of the Sheriff added thereto; and this Distringas is of the same Jurozs, who were well returned before; The Court held, that it was amendable, and for that cause it differed from Rowlands Case, Co. Ante 188.
5. 41. For there the Sheriffs name was wanting upon the Ven. Post. 528.
fac. which guides the residue of the Proces: Wherefore it was Hob. 113.
ordered that it should be amended; And Judgment was given for the Plaintiff.

Taylor versus Welsted, Hill 13 Jac. Rot. 1238.

Error in the Exchequer Chamber, of a Judgment in Trespas (19)
in the Kings Bench; The Error assigned was, that the Declaration was not good, because in Trespas, the Plaintiff supposeth that the Defendant 31. Maij, 13 Jac. at London in such a Parish assaulted him, Et adtunc & ibid. beat and wounded him, and a bag of the value of 12 d. from the Plaintiff with 100 l. in money therein, took and carried away, Et alia enormia, &c. And he doth not say adtunc & ibid. and so no time nor place mentioned of the taking and carrying away of this Bag; And therefore although it be after verdict, yet it is not aided, &c. But the Court held that it was Ante 362;
well enough; For (Et) accouples it with the time and place of Battery: It was then moved, that there wanted in the Declaration vi & armis, which being in Trespas ought to be of necessity, and it is not matter of form but substance, and not aided by any of the Statutes; And of that opinion was the whole Court: Post. 526. 537:
Wherefore for this cause it was reversed. Stat. 168 & 17 Car. 2. c. 8.
aids it.

*Nicholas Brown versus Nicholas Low, Trin. 15 Jac.
Rot. 731.*

Action for words; For that he spake of the aforesaid Nicholas (20)
Brown these words, Thy Master Brown hath robbed me of all my goods. After verdict for the Plaintiff, and damages found to 5 l. it was moved in arrest of Judgment, that these words were not actionable; For he doth not shew that there was any communication of the Plaintiff, nor that he was his Master of whom
LII 2

whom the words were spoken, nor that he served the Plaintiff : So non constat de persona : Sed non allocatur ; For when it is
 Ante 107.231. alledged, that he spake it of the Plaintiff, that is a sufficient certainty : There is also a sufficient demonstration of the person, when he names him, his Master ; For it shall not be intended, that he had more Masters of that name, as it was objected at the Bar, that he might have : wherefore it was adjudged for the Plaintiff. But it was agreed by the Court, if one saith to J. S. Thy Son hath robbed me ; and his Son bring an Action, he cannot without averring that he had no more Sons, maintain it : But if one saith to a Son, thy Father, or to a Wife, thy Husband hath robbed me, the Action lies for the Father and Husband, without any such averment ; for there cannot be more Fathers or Husbands.

1 Cr. 443.
 Ante 374.
 3 Cr. 343.
 Post. 635.
 1 Cr. 92.

Leigh *versus* Gotyer.

(21) **A**ssumpsit : Whereas upon the 24. June, 12 Jac. at D. The Defendant demised to the Plaintiff a Close called the Leer, for two years ; in consideration whereof the Plaintiff adtunc & ibid. assumed to pay for that Lease 26 l. and that the Defendant adtunc & ibid. thereupon promised to discharge and save him harmless, from all charges, troubles and incumbrances : And alledges in fact, that he had not discharged him of all charges and incumbrances : For one Mary Everard, 7. Aug. 12 Jac. distrained in the said Close, four of his Kine, for a sum of money, for which the said Close at the time of the distress was lawfully charged and liable thereto, and the said Kine impounded and detained until he was enforced to pay the said money ; after verdict for the Plaintiff, upon non Assumpsit pleaded, it was moved in arrest of Judgment, that the Declaration was not good ; Because he doth not shew, that there was any charge before due, nor by whom granted : And it might be charged by the Plaintiff himself after the said lease made, and therefore it is no exprels charge upon this promise ; and for this cause it was held to be ill by all the Court : Wherefore it was adjudged for the Defendant.

Ante 315.424.

Thomas Leefer *versus* Samuel West, Hill. 13 Jac.
 Rot. 629.

(22) **E**rror of a Judgment in an Ejectione firmæ ; After the Record removed, and the Error assigned, it was moved, that the Record might be amended ; For the Entry after the imparlance, Ad quem diem venerunt tam prædictus Thomas, quam prædict. Samuel per Attornat. suos, &c. Et prædict. Thomas defendit vim, &c. & dicit non est inde culpabilis, &c. and so Thomas is mistaken for Samuel, which was alledged to be but the default of the Clerk ; And although the Record was removed, and the Error

Error assigned, yet it was ordered to be amended: And presidents shew for amendment in like Cases, the one Trin. 12 Jac. Rot. 1466. Ante 14. betwixt Oliver Spray and George Parsons, where the Entry was, Et prædictus *Olivarius* defendit vim, &c. where it should be prædict. Georgius: And after the Error assigned, it was ordered to be amended; So betwixt Chamberlain and Ewer: After the Record removed, Ante 365. and the Error assigned, the Bill upon the File was amended.

Anonymus.

A Latitat was sued against J. S. and A. S. Baron and Feme, by T. D. The Feme was arrested, but the Baron could not be taken; the Sheriff returned Cepi corpus for the Feme, but Non est inventus for the Baron; The Feme her self did not appear for the Baron: The question was, what should be done in this case: And it was held by the Court, that nothing could be done, unless there were Bail put in by the Baron: For the Feme without the Baron cannot be sued, nor can put in bail, and against the Baron, unless he be first taken and put in bail, there cannot be any Declaration; and therefore in this case, in regard the Plaintiff cannot declare, the Feme was dismissed: And it was said, that he ought to sue them by process of outlawry, and by that means he might have remedy; For it were a great mischief, that a Feme Covert should intermeddle and merchandise, and procure goods into her hands, and the Baron absenting himself, or keeping in his house, there should be no remedy against them; and although it was alledged, that the course hath been in an information of Reculancy against Baron and Feme, that the Baron appearing, hath been compelled to find bail for himself and his Feme: It was answered, that it was at the discretion of the Court; and the reason thereof may be also, because the Baron is to put in bail when she appears, and the loss lieth only upon him: But this reason will not serve where the Feme only is arrested. (23)

Anonymus. Mich. 10 Jac. Rot. 251.

Error in Debt upon an Obligation of 1000 Marks; The Action being brought in Mich. 3 Jac. and continued by impar-
tance until Mich. 10 Jac. and then Judgment given by nihil dicit; And the Error assigned, because the continuance was ab octab. Mich. 7 Jac. usque octab. Hill. 7 Jac. Whereas Octab. Mich. 7 Jac. was adjourned usque mensem Mich. 7 Jac. The Defendant pleaded, In nullo est erratum; afterward a Writ of Certiorari was prayed to certifie the Writ of Adjournment; and it was much doubted whether it should be awarded, after In nullo est erratum be pleaded, because it extends to reverse a Judgment and not in affirmance thereof, in which cases only it hath been usually granted: (24)

But

Ante 369.

1 Cr. 12.

Ante 231.

But it was resolved, that it should be awarded to inform the truth, as well for the reversal as in affirmance of a Judgment; and it was awarded accordingly: And now this Term the question was, Whether a Continuance may be entred upon Octab. Mich. usque Octab. Hill. 7 Jac. And it was moved that it might not; for by the Writ of Adjournment nothing can be done at that day, but to adjourn the Term to the day appointed; and no appearance can be made nor any thing done, but to read the Writ of Adjournment only, and to adjourn all appearances, and all matters and proceedings and Jurores unto the day appointed by the Writ of Adjournment. Vide 4 Ed. 4. 20, & 41. 21 Ed. 4. 37. Mich. 7 Jac. Sir Nicholas Points Case.

Fowler *versus* Sanders, Trin. 15 Jac. Rot. 426.

(25)

Co. Lit. 56. a.
Post. 491.
2 Rol. 265.
1 Cr. 185.
Post. 491.

Ante 152.

Action upon the Case; for laying in the High-way in Coggeshall, leading from Coggeshall to Brayntree divers loads of Logs, whereby they much straitned the High-way; So as the Plaintiff upon the Evening of such a day, riding on the said way, his Horse stumbled upon those blocks, and much hurt him; for which &c. The Defendant confesses it to be an High-way, but he saith, that the Town of Coggeshall is an ancient Mill, wherein all the Inhabitants there, having ancient houses, used time whereof, &c. to lay Logs in wast places of the said way before their doores for their feluel, leaving sufficient passage for Chariots, Horse-men and Foot-men; And that he was seised in Fee of an ancient house, and laid Logs for his feluel in the wast places of the High-way, leaving sufficient for passage of Chariots, Horse-men and Foot-men, &c. And the Plaintiff riding by the High-way improvidè turned his Horse upon the blocks and fell, &c. whereupon the Plaintiff demurred, and without much Argument, it was adjudged; First, that the Action well lay for the Plaintiff, because he having special damage had cause to bring that Action, although the nuisance be a publique nuisance, 27 H. 8. 27. Co. 5. 73. a. Williams Case. Secondly, That the prescription to make a nuisance is not good; for it is against Law to prescribe in such manner. Thirdly, this prescription for the Inhabitants is not good: Therefore it was adjudged accordingly.

Sheirs *versus* Henry Bretton.

(26)

Ante 142.

Covenant brought in London, supposing the place of the demise apud paroch. Sanctæ Mariæ de Bow in London of a Dwelling in D. in the County of Surrey, and therein a Covenant to repair the houses; And alledgeth, that apud Lond. in parochia, &c. he permitted the houses to decay: and upon demurrer; upon a vicious bar pleaded, it was shewed for exception to the Court, that this breach is of a matter local, and not transitory, and is not in this case well assigned; And of that opinion was the Court: whereupon the Plaintiff discontinued his Suit, and began de novo.

Lum-

Lumley *versus* Hutton, Trin. 15 Jac. Rot.

(27)
DEbt upon an Obligation of 400 l. 4. May, 9 Jac. conditioned for the performance of the award of two Arbitrators to be made before the 20th of May following, of all suits, controversies, and demands betwixt them; And if they should not make an award: Then to perform the umpirage of Randolph Woolley, &c. to be made before the first of June following. The Defendant pleaded, *Quod nullum fecerunt arbitrium*; The Plaintiff shews, That one Wincent Busfield was indebted unto him by Bill in 276 l. and died, and made Eliz. his wife his Executrix, and left unto her *Assets, &c.* who took to Husband the Defendant; And that there being a controversy betwixt them for this debt and other matters, they submitted themselves prout the condition, &c. And that the Umpier within the time prefixed made an award, That the Defendant should pay 240 l. to the Plaintiff, in satisfaction of that debt at four several payments, within two years; and express the several days and places for payment, and that upon the last payment, the Plaintiff should make a general release of all actions and demands before the date of the release; And assigns the breach of non-payment of one of the said four sums: The Defendant takes Issue, that he made not any such award; which being found for the Plaintiff, It was now moved in arrest of Judgment, that this Arbitrement was void: First, because this duty is not due by the *Baron* himself, but in right of his Wife as Executrix; And there is nothing in this submission, but that it is due from him in his own right: Sed non allocatur; For the Arbitrators have power as well to make an award for that which is due in his own right, as of that which is due by him in right of his *Feme* as Executrix, which is in another's right: And so it was adjudged here before in *Vanlore and Dribblers Case*, 12 Jac. Vide 21 H. 6. 19. Secondly, it was said, that this Arbitrement to pay 240 l. in satisfaction of a Bill of 276 l. cannot be any satisfaction; For a single Bill cannot be discharged by a nude payment; and it is not awarded, that he shall accept it in satisfaction: Sed non allocatur; For being awarded that he shall pay it in satisfaction, it is therein implied, that the Plaintiff shall accept it in satisfaction; and if he do not accept thereof, and sues the Bill, he forfeits his Bond; For he doth not stand to the submission, which is a sufficient tie unto him, that he shall accept thereof; and being accepted, the arbitrement is a good Bar. Thirdly, it was objected, that the arbitrement is void, for the award to make a release two years after, of all matters before, is void, and then nothing effectual is awarded to be done on the Plaintiffs part; and then nothing being awarded on the one part, it is void, as it is held in 7 Hen. 6. 40. Sed non allocatur; For although this award is void

Ante 86. 377.

Ante 353.
Post 578.664.
Ante 354.
Co. 10. 131.

void for the making of this release, as it was agreed by all the Court ; (For they awarded to make a release of matters after the submission ; yet the award being good in point of payment of the money in satisfaction of the Debt, (which is well awarded for both parties therein) and the breach being assigned in that point, it was held to be a sufficient Arbitrement, and a sufficient breach assigned ; For which cause it was adjudged for the Plaintiff. Vide Co. 8. Rep. fol. 97. Baspools Case ; But the same Term another Case was adjudged betwixt Maw and Samuel, where the arbitrement was, that the one should pay 40s. and the other should make a release at such a day after, of all actions and demands until the date of the release ; It was adjudged to be a void Arbitrement ; for it is not awarded that it should be in satisfaction or discharge of any Debt due, or Trespas done before the submission ; So it doth not appear for what cause it was awarded, nor that the Defendant should have any benefit by the payment thereof.

King *versus* Rumball.

(28)
1 Rol. 833.

Ante 416.

I. S. seised in Fee of Socage Land, deviseth it by these words, *Item*, I give to my Wife *Joan* all my Houses and Free-Lands for her life, and after her death to my three Daughters equally to be divided, (viz.) to *Joan*, *Arice* and *Alice* ; And if any of them die before the other, then the others to be her heirs equally to be divided ; And if they all die without Issue, then to three others named in the Will, &c. The sole question was, What Estate the Daughters should have ; and adjudged by the whole Court to be an Estate Tail. 37 Aff. Pl. 15. 15 Aff. Pl. 14. 15 H. 5. fol. 6. Co. 7. fol. 41. Berisfords Case, Co. 6. 16. and Webb and Herrings Case, Hill. 14 Jac. A man deviseth to his Son after the death of his wife ; And if his Daughters out-live the Mother and the Brother, and his heirs, that then they should have it ; It was resolved to be an Estate Tail in the Son, for it is impossible that the Son should die without Heirs, as long as his Sisters are alive ; And therefore the intent of the Devisor shall be construed to extend to the Heirs of his body, and so to be an Estate Tail. And Houghton put this Case, A man seised of three Messuages, hath Issue three Daughters, and he deviseth one House to one, another to the second, and the third to the third Daughter ; And if his Daughters die without Issue, then to remain to a Stranger : The one dies without Issue ; Quare whether the Stranger shall take it presently, or shall expect until all be dead without Issue.

Baskerville *versus* Brocket.

Ejectione firmæ: One seised of Lands in Fee-simple becomes Bail in the Kings Bench in an Action of Debt; and after Issue joyned, lets his Lands to Baskerville the Plaintiff; Judgment is afterwards given against the Principal, and an extent taken upon the said leased Lands; Baskerville being thereupon outed byings this Action; And whether this Land be liable to the reconuſance, and ſo extendable during the Term, was the queſtion. Bridgeman and Harris for the Defendant argued; That the Land is chargeable, and that this execution is local, and that the Bail is in nature of a reconuſance; And ſo, as a Judgment which ſhall bind the Lands, in whoſoever hands they afterward ſhall come: And although at the time of the Bail it was uncertain whether the Plaintiff ſhould obtain Judgment, yet when the Judgment is given, it ſhall relate to make it certain from the beginning: For when two times are requiſite to the perfection of an Act, it ſhall be ſaid, upon their conſummation, to receive its perfection from the firſt; as Dyer 246. of a Fine levied by a *Feme* ſole; and in Warrantia Chartæ a man ſhall recover *pro loco & tempore*, &c. and 8 Ed. 4. 5. If Bail or mainpriſe be acknowledged, although it be not entered of Record, yet it is ſufficient, and may be entered in another Term; And the words of the Statute of Weſtm. 2. cap. 18. That no Elegit ſhall iſſue; But when Debitum recuperatum fuerit were ſtrongly urged by them; for they be not only quando debitum fuerit recuperatum, but cum debitum fuerit recuperatum, vel in curia Regis recognit. And in this Caſe although there be not debitum recuperatum, yet there is debitum recognit. in curia Regis, and ſo within the expreſs proviſion, that an Elegit ſhall iſſue out of the Lands which he had cum debitum fuerit recognitum. And whereas it may be objected, that the Principal might alien his Lands bona fide, before Judgment, and if the Bail might not do ſo, he ſhould be in a worſer condition: It was thereto answered, That it ſhall be accounted his own folly; And every Bail, although he be Bail but in one Action, yet ſtands Bail for all Actions brought by the ſame Plaintiff againſt the ſame Defendant in that Term: And they ſaid, that if a Conuſee releaſe to the Conuſor all demands and rights in the Land before the Execution the releaſe is not good; Yet it was adjudged, Mich. 26 & 27 Eliz. Rot. 1705. That if a Conuſor make a Feoff. 3 Cr. 462 ment, and before Execution the Conuſee releaſe; It is good becauſe he hath not any means to have Execution againſt the Feoffor but by way of Extent; Whereas in the hands of the Conuſor the Land was not Debtors: And the new Book of Entries fol. 224. was by them vouched for proof of the principal

¶ in m

Caſe.

Case. But George Croke and Coventry Solicitor-General argued for the Plaintiff, That the Lands should not be charged; For it is clear, That the Common Law doth not allow execution of Land for a Personal duty, unless in two Cases; The one of the King by his Prerogative; The other of the Heir, where otherwise the Debt would be lost: As Davie and Peapes Case in Plowd. & Co. 3. Rep. 12. a. b. Sir Will. Herberts Case. For this Execution is grounded upon the Statute of Westminster. 2. cap. 18. The words whereof are, cum debitum fuerit recuperatum, vel in curia Regis recognitum, vel damna judicata sint de cetero in Executione, &c. The question therefore depends upon the true Exposition of the said Statute, wherein it was agreed, that this Bail to some intent was a reconusance in some manner, but not such as this Statute requires and generally to be taken; There being a diversity between an absolute reconusance, and a reconusance conditional; An absolute reconusance is of a Sum certain, at the time of the reconusances entering, as in Mainprise; whereby it becomes a Judgment, and the party thereby enlarged: But it is not so in case of Bail, until all the conditions thereof be performed; which consists of five parts, (1) Si judicium redditum sit: (2) Si judicium redditum sit, and the Defendant doth not pay the condemnation: (3) Or render his body to prison: (4) Tunc vult & concedit, (5) Quod debitum prædictum sit recuperatum, &c. Currat super me, & terras meas, &c. so as the Bail doth not make any consurance, except all the first parts thereof be performed: For Tunc concedit (and not before) quod sit recuperatum; So as until Judgment given there is not any consurance; For extunc designs the time from whence it shall begin as a Duty: Also, although the party be bailed, yet in Judgment of Law, he shall be said to be always in Custodia Mareschalli. Vide 31 H. 6. 10. 32 H. 6. 40. 21 H. 7. 33. But it is not so in the Common Bench; For the party there is not in the custody of the Warden of the Fleet, &c. Secondly, If this Bail should be a reconusance no Capias would lie, as it was resolved 32 Eliz. Pastons Case, and Mich. 11 Jac. Cliffords Case, and 14 Eliz. 306. Putenham's Case; For the Statute of Execution is only de terris & catallis debitoris, &c. And not of the body; and it is so expressed in the tenor of the reconusance, That it is to be levied de bonis, catallis, terris & tenementis, &c. Then when by the rule of the Common Law, the Bail was charged in the same degree as the Principal; And when the Statute of 15 Ed. 3. gave the Capias against the Principal, the body of the Bail shall also be charged by the Equity of that Statute, so as it cannot be said to be a reconusance: But in the Common Bench, because there is a reconusance in a Sum certain, when the Bail is entered the Execution is always Elegit, or Fieri facias, and not

Ante 40 1.

Ante 3.

not a Capias ad satisfaciendum. Thirdly, the Statute also gives an Elegit in Case of Debt, Cum debitum sit recognitum; but of Damages, Cum damna sint adjudicata; And therefore it cannot be any reconusance when a man becomes Bail in an Action of Covenant, &c. Because there is not any duty, but all is to be recovered in Damages. Fourthly, the Entry of the Bail is in placito prædicto only, yet by that Entry he is subject to all Actions in the same Term by the same Plaintiff against the same party, which would be a great inconvenience to the Subject; And therefore ought only to be chargeable from the time of the Judgment as the Principal himself shall be, and not from the time of the reconusance: For then he should be in worse condition than the Principal, which is inconvenient, and against reason. The books in exposition of this Statute say, That it binds as to the Inheritance from the time of the Judgment, and for Chattels from the time of the execution awarded, 42 Ed. 3. 11. 42 Ass. pl. 17. 2 H. 4. 14. And whereas it was said, That when Judgment is given, It shall then relate to the taking of the reconusance: It was thereto answered, That where two Ceremonies are necessary for the perfection of a thing it is not there of any validity, until the last be effected: And that it shall not relate, &c. For then it would be to the prejudice of a third person: And in proof thereof the last Case put in Butler and Bakers, Co. 3. fol. 35. 36. a. was cited; and whereas it was also said, That when Bail is entered in a Term, it shall relate as to bind from the first day of the Term: It was thereto answered, That it shall not bind the person, but from the time of the conusance, as Co. 4. 71. b. Hinds Case: Although one may not have an express averment against a Record, yet when the time is material, he may aver in what time of the Term a Fine is levied: And to that Objection, That although it be not debitum recuperatum, yet it is debitum recognitum; It was thereto answered, It cannot be said to be debitum recognitum before it be cognitum; And here it is not any debitum cognitum until the time of the Judgment; And it is not any duty or demand before. Vide Cok. 5. 70. b. Hoes Case, 25 Ass. pl. 7. 25 Ed. 3. Execution 130. And whereas it was said, That if the Land in this Case should not be chargeable, the Bail might alien his land betwixt the time of the reconusance entered and the Judgment, and so defraud the Execution: It was thereto answered, That fraud shall not be presumed, unless it be averred, and then if it be by fraud, notwithstanding the alienation, the Land shall remain chargeable, as Co. 10. 56. b. Chancellor of Oxfords Case; and Co. 8. 171. Fleetwoods Case; And if the Law should not be so, then a Bail might depend 20 years, and be impossible to be discovered, and no purchaser be in any certainty of his Lands; And how far Purchasers are favoured in Law. Vide Co. 8. 96. Dy. 363.

Lastly, they said, that there be not
 any

any Presidents in Cases of Bail to the contrary; The new book of Entries 224. vouched on the other side, not being against it; For there the Scire facias is, That he shall have the Lands secundum formam recognitionis, which may very well be taken to be from the time of the Judgment rendered; and the new book of Entries 87. accord in an audita querela; And Broom the Secondary said, That the Presidents upon the Entry of a Judgment against the Bail, are, de tempore recognitionis, secundum formam recognitionis.

Doubitoſte verſus Curteene.

(30)

Action of Debt 60 l. upon the Statute of 2 Ed. 6. for the subtraction of Tythes, to the value of 20 l. The Case was such; The Abbot of Evesham and his Predecessors were seised of a Rectory, and of Land within the same Parish, time whereof, &c. until the 26th year of King Hen. 8. At which time the Abbot made a Lease of the said land for sixty years, and by that Lease demised all Tythes renewing, &c. upon the said land, (viz.) Hay, Corn, &c. reddendo perinde, certain Corn-rent; and by the same Indenture it was covenanted, that the Lessee shall not set forth the Tythe of the Hay and Corn to the Lessor, and his Successors, but that the Lessee, his Executors and Assigns shall set forth Tythe of Wool and Lamb to the Lessor, &c. and small Tythes to the Vicar, &c. All which was performed accordingly; Afterwards Anno 30 H. 8. The said Abbey was dissolved, and in 31 H. 8. the Statute made, which enacts, That the Purchasers shall hold it discharged in the same manner as it was in the hands of the Abbots; and then the Statute of 2 Ed. 6. was made: The lease is since determined, and the Rectory came to the King, and the land whereof, &c. conveyed to another: And whether this land shall be discharged of Tythes, or not, was the question; And it was argued at the Bar by Davenport for the Plaintiff, and by Coventry Solicitor-General for the Defendant, and afterwards at the Bench by Doderidge. The points which had been moved in the Case were two; First, whether the unity of possession with these circumstances shall discharge it; And he held that it should not. Secondly, upon the Statute of 2 Ed. 6. cap. 13. whether the Action be maintainable, in regard there had not been any Tythes paid within forty years last past, before the making of the Statute; And he held that it was: First, predial Tythes are collateral to the land, and if he who hath the Tythes and the land makes a Feoffment, the Tythes do not pass included in the Feoffment, as 42 Ed. 3. is; Also possession of the land only

only cannot suspend or extinguish Tythes, &c. although it may suspend the payment, because he cannot pay Tythes unto himself; And therefore unity of possession *prima facie* shall not discharge the land of Tythes: But if Tythes were never paid, then because it may be intended, they were discharged by grant from the Pope, by reason of Orders, or by real composition or satisfaction, or by other means, which means cannot be now known; Therefore the Statute of 31 H. 8. made such an unity which is *iusta, equalis, libera & perpetua*, to be a discharge; For it may be reasonably intended that they were discharged by composition: And if a Parson, Patron, and Ordinary grant land to J. S. discharged of Tythes, he shall hold it discharged: There be also in this Case many circumstances: First, there is a demise of the land and of the Tythes also, which is an argument that they were due and payable, and by that demise to be discharged from payment. Secondly, there is a provision that he shall pay other Tythes. Thirdly, there is a Covenant for the Tythes leased, you shall not be compelled to set them forth: Whereas it hath been objected, that the Rent doth not issue out of the Tythes, it was agreed that in point of remedy it is not issuing out of them; But it cannot be denied, but that the Rent is greater in respect of the Tythes; As if a man hath a Rectory and a Barn, the Barn being worth 4 l. per annum; he demiseth both for 100 l. per annum: Although the Rent was not issuing out of the Tythes, yet all know that the Rent was reserved, having regard to the Tythes: Also in this Case, forasmuch as they are demised to the Lessee, and he hath them by way of retainer, it is as strong as if he had payed them to the Abbot: And in proof thereof, he puts the Case; If there be a Lord and Tenant, and the Tenant holds in Socage, rendering 3 s. Rent, and the Lord entermarry with the Tenant, &c. So 3 Ed. 3. Exchange of an Acre of land for the release of Rent issuing out of another Acre, is a good exchange, yet he hath nothing but by way of retainer. And 45 Ass. Tenant for life is impleaded, and he vouches his Lessor, he shall recover in value; but the Rent shall be *Recouped*, &c. The second question is, upon the Statute of 2 Ed. 6. the words whereof are, Every of the Kings Subjects shall from henceforth truly and justly divide, set out, yield, and pay all manner of their predial Tythes in their proper kind, as they renew and happen, in such manner and form as have been of right yielded and payed within 40 years next before the making of this Act, or of right and custom ought to have been paid. He said, that this was beneficial for those who had Rectories, and for others also: For those who had Rectories; because upon Statute of 31 Hen. 8. Many persons thought that they were discharged of Tythes by the Statute; and by reason thereof they subtracted them; And the Parson was put to his suit, which was only in the Ecclesiastical Court; Now the Statute

Post. 608.

1 Cr. 543.

Co. 2. 41. a.

Post. 559.

Co. 2. 48. a.

2 Suid. 304.

Post. 666.

Statute of 2 Ed. 6. gives him remedy at the Common Law, and trebles his Damages : It is also beneficial to the Owners of land ; For the Statute is, You shall pay no otherwise then hath been paid within 40 years next before the making of the Statute : And he said, that the reason of limiting it to 40 years was this, 20 years in the Ecclesiastical Law make a prescription for the Church, and 40 years a prescription against the Church. Vide for these Prescriptions, 3 Ed. 4. 6 Ed. 4. 8 Ed. 4. 21 Ed. 4. But if the discharge by the space of 40 years was by reason of unity only, or any other composition not real, yet the right continued and after severance, or the composition ended, they were within the Statute, and payable again : Also for another reason (which was not moved at the Bar) he held, that Tythes in this Case ought to be paid ; For it is found that Lamb and Wooll were paid in kind ; and then the payment of part of the Tythes is a seisin of all, for that shews that the land was not discharged by reason of any real composition : And although Tythes of Corn and Hay were not paid during the unity, yet by right they were payable, and only privileged by the unity ; Wherefore he conceived that the Plaintiff ought to have Judgment : Houghton, Croke, and Mountague accord ; And Mountague said, that when Tumor papalis was here in England, all Monks were in respect of their Orders discharged of Tythes ; who afterwards increasing to so great number, and having here great Revenues, Holy Church was thereby impoverished, Et filia devoravit Matrem ; For remedy whereof Pope Paschall the Second ordained that Cestertians, Templers and Hospitallers should be only discharged, and that all other Orders should pay their Tythes. Which also in respect of their great Revenues was found to be an impoverishment to the Church ; And therefore Pope Adrian constituted that the lands of the Templers, Cestertians, and Hospitallers should be only discharged, quæ propriis manibus excoluntur : And now by the Statute of 31 H. 8. all lands are discharged which were discharged in the hands of the Abbot ; And for the reservation, he said, that the Rent issued out of the land and Tythes in point of render, but out of the land only in point of remedy : And Judgment was given for the Plaintiff.

Co. 2. 44. b.
Post. 559.
M. 297.

Dame Griffin *versus* Stanhope.

- (13) **I**n evidence to a Jury at the Bar, the matter being sent out of the Chancery to be tried here ; The Case appeared to be such : There having been communication of Marriage betwixt Sir Robert Griffith and the Lady Stowell ; The said Griffith before the affiance promised to assure unto her 1000 l. per annum

annum for her Joynture, his Estate being then worth 12000 l. per annum : Wherefore the reposing confidence in his promise, married with him before any assurance or Covenant in writing whatsoever ; But afterwards he by Deed conveyed Lands of great value to some friends of the Lady Stowels (then his wife) to the use of the said Lady for term of 100 years, if she should live so long, to commence after his death ; and it was indoxed upon the backside of the said Deed, that the intent thereof was, that when there should be a Joynture of 1000 per annum settled upon her according to the first agreement, that then the Lease should be void : And whether this were a fraudulent Lease or no, was the question ; because it was with a Proviso, to determine at the will of the *Baron* : Where the Court took this difference, where Leases be made with a Proviso, That if the Lessor pay 10 s. that then the Lease shall be void, because it is apparent that the Sum to be paid is not of the value of the Land, but only limited as a power of revocation ; such Lease shall be void, as to the Purchaser : But if a man mortgage his Land for 1000 l. Proviso, that if the Mortgagee pay the 1000 l. that then the Lease shall be void ; This is not a fraudulent Lease, but shall be good against the Purchaser, if the money be not paid thereupon ; And the Court held, that this Lease being made in pursuance of the first promise, although there was not any men- Ante 153
tion of any Lease to be made, yet it was grounded upon a good consideration, and not fraudulent : It was also further objected, that the Lady had concealed this Lease during her Husbands life, and therefore it should be fraudulent, because if she had spoken thereof, she might have hindered Purchasers, &c. But it was thereto answered by the Chief Justice, that all Actions ought to have their resort to their first original ; and he agreed, it had been better if she had discovered that she had such a Lease ; but the Lease being good at the first, the concealment thereof cannot make it ill. Another objection was made, that her *Baron* was Tenant in Tail at the time of making this Lease, and therefore it was a void Lease to begin after his decease, (where to the Court seemed to incline) but to avoid it, Chose of Council with the Lady produced a Common Recovery, which had docked the Intail ; Whereupon the Council on the other side pressed them to prove who was Tenant to the Præcipe at the time of the recovery : But the Court would not allow thereof ; For it shall be intended to be a good recovery ; and if it were otherwise, the proof ought to be made by the other party. Another objection was made, that this was the Land of King Henry the 3. who gave it to Elinor with his eldest Son in Tail, the reversion in the Crown ; so as Griffin had not any title to make this Lease : And they shewed a grant from the King to intitule themselves. Where to Hilcham Serjeant said, that if there were a gift in Tail, the reversion in the Crown before the Statute of Donis, and the possession hath been, time whereof, &c. in purchasers ; If the possession cannot be proved to be in the King, after the
Statute

Statute of West. 2. &c. It shall be intended to be made post prolem suscitata, and before the Statute of Donis : And so if a Parson shews that 200 years certain Land was parcel of his Glebe, It is not therefore of necessity, that the other should produce a confirmation from the Patron and Ordinary ; for the continuance of the possession makes it intendable to be according to Law at the time when it was made : Afterwards they on the other side shewed a Record in 10 Ed. 3. (which was long after the Statute of Donis) proving it to be in King Ed. 3. and that the Estate Call then continued. Montague Chief Justice said, he would be better advised : Whereupon, and by the motion of the other Justices, the parties agreed to have a Juroz withdrawn, which was done accordingly : And it was said in this Case, That a Lease may be determined by force of a condition indorsed upon the backside thereof, if it be before the enfealing and delivery, as well as by force of a condition within the Deed ; which was not denied by any.

Termino

Termino Hillarii,

Anno decimo quinto J A C O B I Regis.
in Banco Regis.

Sir Philip Stanhope *versus* William Stanhope, Trin.

14 Jac. Rot. 612.

ERror of a Judgment in the Common Bench, in a Writ of Annuity, where the Issue was, Non est factum, and found against him: The first Error assigned was, because a Juroz was returned upon the Ven. fac. Hugh Maltby, and upon the Distringas, Hugh Meltby was returned and sworn; and it was held to be a manifest Variance and Error, unless it might appear by examination of the Under-Sheriff, that he was the same person; and although this was in the time of another Sheriff who was discharged and the Under-Sheriff also; yet he being procured to come into Court, and examined and the Juroz himself whether he were sworn, and it appearing that he was the same person so named, it was awarded that it should be amended. A second Error assigned was, because one John Collingham of Cortlington was returned upon the Venire facias; and one John Collingham of Collington was returned and sworn upon the Habeas Corpus, and so another man not first returned; and in rei veritate, there was not any such town of Cortlington or Gortlington, but it was a Village called Cortlingesthorpe; and it was argued that it should not be amended, because it was ill, and mistaken in the Ven. fac. But after divers motions, the Court resolved that it was well enough; for the alteration in the name of the Will where the Juroz inhabited, is not material; for he may be an inhabitant of such a Will at the time of the Ven. fac. returned, and at the time of the Distringas returned he may be commorant at another Will, and so it may be well intended; and when by any intendment it may be good, it shall never be reversed; And this differs from the Cases, where a Juroz is misnamed in his Christian or Surname, as the Case in Coke lib. 5. fol. 42. Wherefore notwithstanding the Exception, the Judgment was affirmed.

(1).
Post. 502.
Hob. 328.
Post. 502.
1 Cr. 563.
Ant. 396.

Ant. 244.
Post. 654.

Ellis *versus* Fitch.

Action for these words, Thou hast stoln as much Corn out of my fields as is worth 9 or 10 s. After Writ of Inquiry of Damages, upon Nihil dicit, it was moved in arrest of Judgment that an Action lies not for these words; for it may be well intended, standing Corn, and then the taking is not Felony, and so no Action

(2)
Ant. 442.

Non

lies:

Ant. 40.

lies: But the Court doubted thereof, and would advise.

Goddard *versus* Hampton.(3)
Co. 5. 42. b.

Action upon the Case; after Verdict, it was moved in arrest of Judgment: that one John Wale was returned upon the Ven. fac. and upon the Distringas one John Wats was returned and sworn, and upon the Examination it appeared that the Turoz was named John Wats, and not John Wale; wherefore the Court held, that the tryal was ill, and the Record not amendable: But it was then moved, whether there might be a Ven. fac. de novo, or that the Writ should abate; and it was resolved, that Ven. fac. de novo should be awarded; for the fault was only in the Tryal.

Marlham *versus* Bulwer, in the Exchequer-Chamber.(4)
1 Cr. 90.

Ant. 64.

Error of a Judgment in the Kings Bench; The Error assigned was, because the Bill was filed die Mercurii post Octab. Purificat. anno 14 Jac. which was upon the 12 Feb. And the parties being at Issue, the Ven. fac. bare Teste 10 Feb. which was two days before the Bill filed, so it was before any Issue could be joyned, and so an ill Ven. fac. and not holpen by the Statute. But all the Justices and Barons held, that it should be as if there had been no Ven. fac. For it cannot be intended a Ven. fac. in this Action, being before the Action commenced, and it is contrary to the Roll, which mentions it to be awarded after the Issue joyned: Wherefore they ought to have regard thereto, and not to the awarding of the Ven. fac. which is before the Action begins: And although in the Action (which being joyned the same Term, and by the same Roll) the award was of a Ven. fac. returnable also die Mercurii post Octab. purificat. (which was the same day whereon the Bill was filed, and he pleaded) yet it was held good enough, and the Judgment was affirmed.

Smith *versus* Bole.(5)
2 Rol. 455.

Ant. 153.

Ejectione firmæ of a Lease made by Smith, a Prebend, to the said Bole: Upon a special Verdict, the Case was such; The said Prebend was usually let with the Exception of all Crab-trees, and such like trees, rendring 17 l. per an. Upon 8 Aug. 6 Jac. The Prebend made a Lease of the said Prebendship, omitting the exception, Habendum a die consecrationis, for threelives, rendring the ancient Rent, and made Libery 9 Septemb. 6 Jac. And whether this was a good Lease to bind the Successor by the Statutes of 13 Eliz. & 32 H. 8. was the question. First, whether this Lease Habendum a die consecrationis, and Libery made after, be good or not: Resolved that it was; for the Libery being made

made after the day, not working futurely, was good enough. Secondly, whether this exception of the trees, being in all former Leases, and omitted in this Lease, makes it void: And it was resolved, that it was void; for there being more let than was anciently, the trees, and the profits of the trees, and the soil it self, is excepted by this exception, so as every Successor cannot have the benefit of boughs and fruits yearly renewing; and the soil it self whereupon they grow, is excepted: But by this new Lease, the trees and profits are let and the soil it self; and so more being let than anciently, it is not within the Statute of 32 H. 8. and it is void by the Statute of 13 Eliz. For it is not the ancient Rent where there be more let than was before: Wherefore it was adjudged for the Plaintiff. Vid. 14 H. 8. 1. Dy. 376. 46. Ed. 3. 22. Co. 4. 63. Co. 11. Lifords Case fol. 50. a.

32 H. 8. c. 28.
13 El. c. 10.

Co. Lit. 44. b.
2 Rol. 455.

Co. Lit. 44. b.

Child *versus* Baylie and others.

Ejectione firmæ; of a Lease of Thomas Heath of Lands in Alchurch: Upon Not guilty pleaded, and a special Verdict, the Case was such; William Heath possessed of a Lease for seventy six years of the Land in question, let it unto one Blunt, from the day of his death, until the first of May 1629. (which was three months before the end of the Lease) if Dorothy his Wife lived so long; afterwards he demised, that William Heath his Son and his Assignes should have the said Tenements, and the Reversion of them, and all his Title and Interest in the said Tenements, for all the others of the said seventy six years which should be unexpired at the time of his Wives death; Provided, that if the said William died without Issue living at the time of his death, that Thomas his Son (the now Lessor) should have it for all the residue of the seventy six years unexpired from the death of his said Wife, and of William without Issue; and if he died without Issue, then to his Daughters: And made his Wife his Executrix, and died: The *Feme* assented to the Legacies; William assigned all this Lease and his Interest thereto to the said Dorothy, who assigned it to Mr. Comb, under whom the Defendant claims: Afterwards Dorothy died, and then William died without Issue, Thomas the Devisee enters, and makes this Lease to the Plaintiff; And if, &c. After divers arguments at the Bar, it was adjudged for the Defendant. First, it was resolved, where Lessee for years let it after his death, until the first of May 1629. That it was a good Lease, which began immediately by his death, he dying within that time. Secondly, that the Lease being made to begin after his death unto the first of May 1629. (the Lease being made 12 August 1553. if Dorothy his wife should so long live) he did not thereby convey the interest and remainder of the Term, viz. from the first of May 1629. unto 12 August 1629. and the possibility of a long Term if

(6)
Jones 15.
1 Rol. 612. 13.

Co. i. 155. a.

1 Rol. 612.

Dorothy died before the first of May 1629. which interest and possibility together he might devise unto William Heath his Son. The third and main question was, whether this devise being to William Heath and his Assigns, with a Proviso, that if he died without Issue living, that Thomas Heath should have it; and he aliens it, and afterwards dies without Issue; whether this alienation shall bind T. H. or that he may avoid it: And it was resolved that this alienation shall bind; for when he limited unto him and his Assigns, all the Estate was vested in him, and he had an absolute power to dispose thereof; for the Law doth not expect his dying without Issue: And therefore the difference is, where a Lease is devised to one if he live so long, and afterward to another; the first hath but a qualified Estate, and the other hath the absolute interest, and therefore this alienation shall not prejudice him who hath the absolute Estate: But when it is limited to him and his Assigns, then the Proviso thereto added, is void to restrain the alienation: And the limitation to the Heirs of the body, and the Proviso be all one; for all long Leases would be more dangerous than perpetuities: And therefore this Case differs from the Cases in Co. 8. fol. 96. & 10 fol. 46. Lampets Case, That a devise for life could not bar him in Remainder: And Lewknors Case was cited Anno 13 Jac. in the Exchequer Chamber; wherefore it was adjudged for the Defendant. Note, upon this Judgment a Writ of Error was brought in the Exchequer Chamber; and the Error assigned in point of Law, that the Remainder of this Term limited to Thomas Heath after the death of William without Issue then living, was good, and the alienation of William shall not bind him in Remainder: And it was argued by Bridgman, and afterward by Humphery Davenport for the Plaintiff in the Writ of Error that it was a good Limitation of the Remainder of the Term to William and his Assigns, with the Proviso, That if he died without Issue then living, then the Remainder should be to Thomas, &c. And that it is no more in effect than after his death; and therefore it differs from Lewknors Case adjudged in the Exchequer where a devise of a Term to one, and the Heirs of his body; and if he die without Issue, that it shall remain to another, was held to be a void Remainder: For he cannot limit a Remainder upon a Term, after the death of another without Issue: But here it is but a Remainder after the death of one without Issue, viz. William dying without Issue then living: So upon the matter it depended upon his death, and therefore not like to the said Case, but it is agreeable to the Reasons put in the Cases of Co. 8. Rep. fol. 94. Matth. Mannings Case, & Co. 10. Rep. fol. 46. But it was argued on the other part by Tho. Crew and George Croke, that the Judgment was well given in the Kings Bench; for here the Limitation being to William after the death of the Devisors wife, of all his Estate and Interest to him and his assigns, it is but a Remainder

der, for the *Feme* may outlive all the Term, and then this devise of the Remainder of the Term is given to him in particular, and William hath but a possibility; and then to limit it to Thomas after the death of William then living, is to limit a possibility upon a possibility, which is against the Rules of Law, as it is held in Co. 1. Rep. fol. 156. in the Rector of Chedingtons Case; & lib. 8. fol. 73. the Lord Staffords Case. Secondly, that this limitation to Thomas after the death of William without Issue then living, is all one as if it had been limited upon his death, without Issue; and the addition (Then living) doth not alter the Case: For at the first limitation, non constat, that he should die without Issue; and the Law shall not expect his death without Issue: And it is not like to the Case, when it is limited after the death of one; for it is certain, that one must die, and it may be that he may die during the Term, and the Law may well expect it: But that one should die without Issue, the Law will never expect such a possibility, nor regard it; and it would be very dangerous to have a perpetuity of a Term in that manner; for it would be more mischievous than the Common Cases of perpetuities which the Law hath sought to suppress; and therefore it was said, that this case was like to some of the Cases which had been adjudged, That the Remainder of a Term after the death of one person is good, and should not be destroyed by the alienation of the first devisee. Vid. Co. 8. 94. Mannings Case, Co. 10 Lampets Case, Plowd. 520 & 540. Dy. 74. 277. And after divers arguments, all the Judges of the Common Bench, viz. Hubbart, Winch, Hutton and Jones; and all the Barons (besides Tanfield Chief Baron) agreed with the first Judgment; for they said, That the first grant or devise of a Term made to one for life, Remainder to another, hath been much controverted, whether such a Remainder might be good, and whether all may not be destroyed by the alienation of the first party; and if it were now first disputed, it would be hard to maintain; but being so often adjudged, they would not now dispute it: But for the Case in question, where there was a Devise to one and his Assigns, and if he died without Issue then living, that it would remain to another; it is a void devise, and it is all one as the Devise of a Term to one and his Heirs of his body, and if he die without Issue, that then it shall remain to another, it is merely void: For such an Entail of a Term is not allowable in Law, for the mischief which otherwise would ensue, if there should be such a perpetuity of a Term: And although Tanfield Chief Baron doubted thereof, especially by reason of a Judgment given before in the Kings Bench, Hill. 9. Jac. Rot. 889. betwixt Rethorick and Chappel, where William Cary possessed of a Term for years devised it to his *Feme* for her life, and afterwards that John his Son should have the occupation thereof as long as he had Issue; And if he died without Issue unmarried, that then Jasper his younger

Ant. 198
1 Cr. 230
Post. 510.

1 Rol. 612. 31

younger son should have the occupation thereof as long as he had Issue of his body; And if he died without Issue unmarried, he devised the moiety to Dorothy his daughter, the other moiety to Robert and William his Sons; and made his *Feme Executrix*, who assented to the Legacies and died; John and Jasper died without Issue, unmarried; and afterward Robert and William entred upon the Defendant, claiming the moiety, and lets to the Plaintiff: Upon a special Verdict, all this matter being discovered, it was adjudged for the Plaintiff, that he should recover the moiety which is all one Case with the Case in question: But the Defendants Counsel in the Writ of Error shewed, That there was a difference betwixt the said Cases; for first, in that, there is a devise out of the occupation only; but here, of the Term it self. Secondly, it is a devise here of his Estate and Term, to him and his Assigns, wherein is authority given, that he may assign. Thirdly, the limitation is there, if he die without Issue unmarried, which is upon the matter, that if he die within the Term, for if he be not married, he cannot have Issue: But in the Case here, he might have Issue; and yet if that Issue should die without Issue in his life time, it should remain, which the Law will neither expect nor will suffer. But the Justices and Barons, by the assent of Tanfield, all agreed, that Judgment should be affirmed; and in Hill. 20 Jac. it was affirmed.

But it is holden in Manningham
case 8 Rep. 96. B. A person who
forrows himself in a devise of
term or lease, & devise of
& Occupation.

Large *versus* Alton.

(7) **P**rohibition was prayed upon the Statute of 5 Ed. 6. c. 4. For
bawling in the Church-yard; because Costs were there gi-
ven, &c. and it was denyed per curiam: The Costs being there
pro. expensis litis; otherwise, if it had been pro damnis.

Co. 4. 20. a.

(8) **N**ote, That one outlawed prayed to appear by Attorney; and
upon an Affidavit made of his sickness, the Court *ex gratia*
speciali allowed him to appear by Attorney: But the Clerk was com-
manded to enter it, *Quod venit in propria persona*; For the Law is
clear, that upon an Outlawry he ought to appear in person.

Sir William Read and his Wife *versus* A.

(9)
1 Rol. 44.

1 Cr. 329.

Action upon the Case against A. for these words spoken of the
Plaintiffs wife; Thou art a forsworn Whore and an old Bawd;
and adjudged that they were not actionable.

Athil

Athill *versus* Corbet.

Trespas: for the taking of a Greyhound with a Collar; The Defendant saith, that the Dog was courting an Hare in his land and therefore he took and led him away: Whereupon the Plaintiff demurred; and adjudged for the Plaintiff, because the Plea is frivolous. Whereby it seems Trespass lies. And 12 H. 8. & 2 E. 2. Avowry; adjudged that Replevin lies of a Ferret.

(10)

Hutchins *versus* Glover, Hill. 14 Jac. Rot. 22 I.

Ejectione firmæ: The Case was such; Hanby being Incumbent of A. and lying in extremis, one Wingfield (who pretended to be Patron) and Glover the Defendant (whom he intended to present to the said Church) entred a Caveat with the Bishop in this manner, Caveat Episcopus Norwicensis ne quis admittatur ad Ecclesiam de A. nisi convccati Glover & Wingfield: The next day following, the Parson died; Nanton a stranger presented Morgan, who was admitted and instituted; immediately after Wingfield presented Glover, who was admitted, instituted, and inducted; afterwards the King (being found by Jury to be the true Patron) presented Roan, who was admitted, instituted, and inducted; and after that Morgan was inducted: And the sentence in the Spiritual Court being declared to be inanis, irrita & nulla by reason of the Caveat entred by Wingfield, &c. Roan entred and let to the Plaintiff, &c. And it was argued at the Bar by Henden Serjeant for the Plaintiff, and by Davenport for the Defendant; and afterwards by the Justices: And Justice Houghton held, that by the admission and institution, there is a plenarty against common persons, as 11 H. 7. 29. Dy. 360. Co. 9. 132. but the Church is open to the induction of the King, so as this Case rests only upon consideration of the Caveat, what aid is given to Glover thereby, the determination of the Canon and Civil Law being contrary to the Common Law; the right of Patronage being tryed in foro Ecclesiastico in other Nations, but as Linwood saith, Aliter utitur in Anglia; therefore in such Cases, they ought to adjudge after the Common Law. Vid. Dy. 293. Bedingsfields Case, and Doctor and Student fol. 113. A man deviseeth 10 l. to I. S. to be paid at his fullage, and he sues for it when he comes to the age of twenty one years; although by the Ecclesiastical Law, full age is at twenty five years, yet in that Case they ought to adjudge after our Law; and a difference was taken betwixt Acts of Parliament and Sentences in Ecclesiastical Courts; for an Act of Parliament may make a nullity, as if the thing never had been done, as 4 H. 7. St. Legers Case, that which was punishable was made dispunishable; but otherwise of a sentence: And in this Case, if this sentence

(11)

2 Rol. 220,
282, 349.2 Rol. 349.
Co. Lit. 119. b
344. a

Co. 8. 135. b

2 Rol. 220.

tence should make the admission and institution void ab initio, it would destroy the induction of the King, and make the superintention (which at the first was merely void) to be good; and this sentence may be twenty years after the induction, whereby it may happen that the Patronage should be lost: Wherefore Judgment was given for the Plaintiff, and that the Kings presentee was the lawful Incumbent: And Montague said, that the Caveat entered in the life of the Incumbent was idle, and to no purpose; and Doctor Talbot then said, that a Caveat is of force for three months only, and that any one may safely present after the end of three months, as if no Caveat had been entered.

Carters Case.

(12)
2 Rol. 804.

2 Rol. 804.

2 Rol. 804.

Error brought to reverse an Outlawry for Murder; The Error assigned was, Quod tempore promulgationis Utlagariæ, & diu antea & post he was in partibus transmarinis, viz. apud *Harlem* in *Hollandia*, &c. And the Attorney General confessed it: And it was moved at the Bar, that this assignment of Error was ill; for he ought to have said at the time of the Exigent awarded, and not at the time of the Judgment of the Outlawry. Vid. 3. H. 6. 46. & 29 Ed. 2. But to prove that this assignment was good, was vouched on the other side, 1 H. 7. 13. 7 H. 6. 25. and the new book of Entries 23 *Eliz. Skirrows Case*. Et per curiam, If a man commits a Murder, and after Exigent awarded, he flieth out of the Realm, and after he is outlawed, he shall not reverse this outlawry for that cause; for he departed *destinato consilio*, and upon set purpose to avoid the Law; and therefore by his absence he shall not have the benefit of the Law; and if one commit Felony or Murder, and after Exigent, and before Outlawry departs, and afterwards brings Error thereupon, and assigns his absence for Error, the Kings Attorney may reply, that after the Exigent, and before the Outlawry pronounced he departed: But for as much as in this case the Attorney General hath confessed; Et non constat to the Court that he departed; for that cause, the Outlawry was reversed, and he pleaded to the Indictment Not guilty, &c. and was found guilty of homicide.

Holford *versus* Platt.(13)
Hob. 266.

Affise of *Novel Disseisin*: The Tenant pleads a Recovery in a former Affise against him; The Defendant replies, that he was an Infant, and avers, That he was not Tenant at the time of the Recovery, but that Platt was Tenant, and that it was a recovery by default; whereupon the
Tenant

Tennant demurred; This Case was argued several times at the Bar in Trin. and Michaelmas Term, by Finch and Coventry for the Defendant, and by Davenport and Ireland for the Plaintiff; and now this Term it was argued at the Bench: Houghton Justice held the Bar to be good, and that a Recovery in an Assise is a good Bar in another Assise, as 31 Assise Pl. 28. 9 H. 7. 23. Co. 6. fol. 7, & 8. and he said that the Replication consisted of three allegations; First, that before the Assise brought in the Common Bench, he was seised, and by the Tenant disseised; whereto he said, that a general allegation is no good Plea against a Judgment, and cited 5 H. 7. fol. 30. in Colts Case, and 22 H. 6. 51. where a Fine is pleaded from an ancestor of the Plaintiff in Bar of an Assise, if the Plaintiff be an Infant, the Assise shall not be taken at large, because it is matter of Record, whereto he ought to answer, 10 H. 7. 5. 8 Ass. Pl. 16. 3. 3 H. 6. 27. 14 Ed. 3. Title Ayell 1. and the opinion of Parning, (where a Recovery by default is pleaded in an Assise, that the Plaintiff might notwithstanding be received to aver his Writ) was denied by the other Justices to be Law; and the Case in 9 Ass. Pl. 10. (where in an Assise brought, the Tenant pleaded, that he recovered against a stranger in an Assise the same Land; and the Plaintiff made Title to himself by general allegation, (viz.) That long time before the Writ brought he was seised until disseised; and Issue being thereupon, The Title was awarded, without shewing how he came thereto) was held by him to be good Law: But the Case at the Bar differed from it; for here the Recovery is against the Plaintiff himself, and in the other it was against a stranger: And where it hath been objected, that if a man hath a Judgment to recover in an Assise, the Tenant in such Case may have an Assise of an higher nature; it is to be intended, where a Seisin shall be alledged, which is more ancient than the disseisin: For the Recovery binds all Seisins, which are *Puisny* to the first Disseisin, unless the Case of Dower. The second allegation is, That the Plaintiff, (Defendant at the time of the former Recovery) was an Infant, and yet is: To that he answered and agreed; that an Infant shall have divers Priviledges which a person of full age shall not have, 1 and 2 Phil. and Mary. If Judgment be given against an Infant by default, after the default he shall have a Writ of Error, and reverse the Judgment for his non-age; yet he said, if an Infant after appearance makes default, Judgment shall be given against him, and he shall not reverse it. 14 Ed. 3. Saver default 40. 17 Ed. 3. Saver default 78. 34 Ed. 3. 64. 9 Ed. 4. 16. 44 Ed. 3. 24. And if default shall not bind an Infant then a Recovery could not be had against him until full age; and whereas the Cases in 7 H. 4. 22. where an Infant brings an Assise, and was barred; and afterwards brings a Scire facias to execute a Fine of the same Land; and the bar

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Dyer 104. a
1 Cr. 307.
3 Cr. 51.

3 Cr. 309.

in

in the Assise pleaded against him was not allowed: And in 3 Ed. 1. Title Infancy, &c. may seem to contradict his opinion, he said, there was a difference betwixt a concluding by pleading, and a Bar of his right by Judgment. The third allegation was, That Holford was not Tenant of the Freehold: Whereunto he said, that that should not help him, for he shall not be allowed to plead Non Tenure generally against the Judgment; as 14 Ed. 4. 2. Doderidge Justice argued to the contrary, and said, That a Recovery was not so sacred, but that it might be falsified as well in point of Recovery for the thing, as also betwixt the same parties; The Case in question is concerning an Infant; and as it appears by Dy. 104. and 5 Ed. 3. The Judges ought to be his Counsellors; In this Case also the Infant cannot have Error or Attaint, and therefore he may falsifie: First, here is a Title and Judgment pleaded against an Infant, whereas his Title is not discovered, which ought to be done two several ways, (viz.) by appearance, or by default; upon his appearance in two manners, (viz.) *sur confession*, or *sur nient dedire*: If an Infant in an Assise will confess, the Court shall not receive his Confession; and if he will not plead, the Jury shall not inquire upon the point of Seisin, but at large, 26 Ed. 3. 63. If he makes a default, and so will not discover his Title, his default is either mera negligentia, and that shall not prejudice him, 17 Ed. 2. Saver default 78. 12 Ass. Pl. 37. 14 Ed. 3. Saver default 40. or it is negligentia cum contemptu, as Bracton calls it, and is in the same degree as a departure in despite of the Court, (as if he appear, and after makes default) and there Judgment shall be given against him, 9 Ed. 4. 16. & 34 Dy. 104. 7 Ed. 2. Saver default 75, 78, & 80. But posito, that Judgment were given against him, upon *Laches* he may have a Writ of Error, and alledge that he was an Infant, and that it was given against him by default, and the other shall not plead. In nullo est erratum, but the Issue shall be upon the nonage: But in this Case he cannot help himself by a Writ of Error; for the Judgment is not given against him upon the default, but the Assise is upon the default, as Ferrers Case Coke 6. Rep. fol. 8. Also he cannot in this Case have an Attaint, for it may be the Verdict is true, as admitting that Platt was seised and disseised by Holford, and then released to Holford, and afterward disseised Holford; in this Case the Verdict is true, and yet he may maintain the Assise against Platt: And whereas it hath been said, that one shall not falsifie where himself is party; that rule hath three Exceptions; First, if I can shew by way of Replication, that this Recovery is void in Law, I may falsifie it in an Assise, as 36 H. 6. 32. 39. Ass. Pl. 6. & 6 Ed. 3. 54. Secondly, if a man recover against me certain Tenements in B. and they lie in A. and I bring an Assise of my Frank-tenement in A. the Recovery in B. shall not bar; 20 Ed. 2. Faux Recovery 12. Thirdly, where the Recovery by default was

was upon a Writ abated : & if an Assise were brought against my Father, and he died, hanging the Issue, and Judgment is afterwards given against him; in this Case, because the Writ was abated de facto, I may falsify the Recovery, 32 Ed. 3. Ass. 99. Croke Justice to the contrary, he granted that an Infant hath divers priviledges, as well touching his person as his Estate; in all real Actions an Infant shall have his age, 47 Ed. 3. 7. 21 Ed. 4. 78. 13 Ed. 3. Age 7. But the difference is betwixt those things which concern the hereditary right (for which the Parol shall demur) and those Actions which are brought and grounded *de son tort demesne*, as in Waste, Disseisin, or the like; and the reason is well expressed in 3 H. 7. That he shall not be there priviledged, *Quia malitia supplet aetatem*: And where it is said in 3 H. 6. 10. that an Infant shall not lose by default, it is to be understood of an Hereditary right. Secondly, he held, that this point having been tryed, it cannot be tried again, and relyed upon Ferrers Case, Co. 6. 7. & 19 H. 6. 3. 9. Thirdly, he held, that the Infant might have Error or Attaint; for first, the Jury may have precise Conscience; the proof also is in the affirmative (viz.) a seisin and disseisin: And the burthen thereof lies upon Platt to prove; nor ought the Court to recede from the former Judgment, for *judicia in curia Regis reddita non debent reversari vel annihilari, nisi per errorem vel attinctam*. Fourthly, it is not meer negligence, but a contempt is there-to joyned: and there is difference betwixt a default upon an Original in another Action, and a default in an Assise for the solemnity of that Action: But as the case is, he conceived there was not sufficient matter to stay the taking of the Assise; for first, the Defendant Platt pleaded it by way of Estoppel and Conclusion, and doth not say in fact, that he himself was seised, but the chief reason is, the circumstance and mischief which would ensue; for the fraud is so visible and palpable, *quod manu tractari potest*; and then the Rule holds, *Qui per fraudem agit frustra agit*, 44 Ed. 3. 46. 41 Ass. 48. 21 Ass. Pl. 1. Recovery by Collusion, *pendant le Action* shall not abate the first Writ. 5 Ed. 3. Et 5 Ass. 3. Tenant for life suffers a Recovery by Collusion *ou nient dedire*, it is a forfeiture of his Estate, 19 H. 8. 5. 44 Ed. 3. 46. Co. 3. 78, 79. Mountague Chief Justice argued, that this Recovery pleaded in Bar, is void, because the Assise is *de puis son temps* to that Assise, and so prevented to have Recovery before the Plaintiff, which is confessed by the demurrer; and he agreed that regularly a Bar in an Assise is a Bar in an Action of the same nature. But this Rule hath three Exceptions; first, in Case of a Parson, Prebend, or Tenant in Tail, as the book of 8 Ed. 3. 28. is. Secondly, if he be in from any Title, 10 H. 7. 5. 22 H. 6. 18. Thirdly, if he be an Infant, as 5 Ed. 3. 32. *Homes non juvenes* is; For an Assise is not so strong an Estoppel as other Actions; for as 5 H. 7. 12. Tenant

Co. 6. 8. a.

Co. 6. 8. b.

pleads in Bar, the Plaintiff shews all his Title at large, without answering to the Bar: So in 9 Aff. Pl. 10. And there is not any difference where the Recovery is against a Stranger, and where against the Tenant; and he said, That this Assise was brought of a Seisin, to the Disseising alledged in the first Assise, and cited, 3 Ed. 3. 46. 13 Ed. 3. Title 6. 22 Hen. 6. 18. 21 Ed. 3. 23. & 21 Aff. Pl. 9. And as to the Objection, Quod judicia reddita in Curia Regis, &c. it holds not in this Case; for as Doderidge said, It cannot be helped by any of the said ways: An Infant also is out of the intent of this Statute; for a Judgment against an Infant shall not bind him; for all Judgments be either by award, by confession, by default, or by tryal; For the first Judgment by award shall not; for as 8 Aff. pl. 17. is, he may plead Release in Bar after an Assise awarded: So 10 H. 6. 14. Judgment in Account against an Infant, that he shall account, doth not bind him, if he doth not enter into the account. Secondly, upon Confession, 9 Ed. 3. 38. 28 Aff. Pl. 52. Thirdly, upon tryal by default, as 3 H. 6. 10. & 28. Aff. and fourthly, upon Judgment, by tryal, that it shall not bind an Infant; the Book of 33 H. 6. 21. that if there be a Tryal by Verdict, it shall bind an Infant, is to be expounded by 7 H. 4. 25. where it is said to be in a Tryal, where the Infant shall once appear; and for authority in the Case, Vid. 18 Aff. 16. 26 Aff. Pl. 6. And Assise was thereupon awarded; and after this demurrer adjudged for the Plaintiff; the Tenant in Pasc. 16 Jac. being demanded made default: Whereupon the Jury were directed by the Court to enquire only of Damages from the time of the Disseisin; for the Seisin and Disseisin are confessed by the demurrer of the Tenant, as 15 Aff. pl. 15. & 17 Aff. Pl. 2. if in an Assise the Tenant pleads a Release in Bar which is found against him, the Assise shall be awarded in right of damages; and it is there said, with a Nota, That if Tenant pleads in Bar, and afterwards demurs in Judgment upon another point out of the point of the Assise, and Judgment pass upon the Demurrer against him, that the Assise shall be awarded in point of Damages, and not at large; and 31 H. 6. upon a Plea pleaded, which is out of the point of the Assise, Seisin shall be taken to be confessed; and the Jury shall inquire only of the Damages, and so the Judgment was here given accordingly.

Southern *versus* How.

(14)

Action *sur le Case*; wherein the Plaintiff declares, That the Defendant being possessed of divers goods, viz. of three counterfeit Jewels, and having Factors in Barbarie, and knowing that

that the Plaintiff was beyond the Seas, he acquainted his Factor therewith, and commanded him to conceal the counterfeiting thereof; and directed him to the Plaintiff, being there; and the Factor came unto the Plaintiff, and intreated him to sell those Jewels for him, telling him they were good Jewels; whereupon the Plaintiff, not knowing that they were counterfeit, sold the Jewels, being of the value of 100 l. to the King of Barbarie for 800 l. and delivered the money to the Factor, who delivered it over to his Master: That the King of Barbarie afterwards finding they were counterfeit, committed the Plaintiff to Prison, until he repaid to the said King 800 l. And that afterwards the Plaintiff requested the Defendant to pay back unto him the said 800 l. and he refused. The Defendant pleaded the general Issue; and the Jury upon a special Verdict found all this matter, excepting, That the Defendant had directed his Factor to the Plaintiff; and that the Defendant had commanded his Factor not to discover that the Jewels were counterfeit: And it was argued for the Plaintiff; First, that where one is party to a fraud, all which follows by reason of that fraud, shall be said as done by him; and here the Defendant is the first actor in this fraud; First, by his knowing they were counterfeit; Secondly, by sending his Factor and selling them in Barbary: And to that purpose were cited Plowd. Comment. 473. Sanders Case of the poisoned Apple, & Co. 9. 81. b. Gores case, And in this Case, it is a deceit although there be not any warranty, as 9 H. 6. 53. & 21 Aff. pl. 41. & 42. Aff. pl. 8. 7 H. 4. 15. 11 E. 4. 6. 5 E. 4. 126. & Co. 4 18. b. 20 H. 6. 35. and Chandler and Lopus Case adjudged in this Court 1 Jac. where one sells a Bezar stone, sciens that it was counterfeit, and he did not warrant it, yet for that it was sciens, the Plaintiff had judgment. Secondly, he held, that although the Jury had not found all the matter contained in the Declaration, yet because they have found matter sufficient, that the Plaintiff shall recover: And to that purpose were cited Bridges Case, in Dy. 75. and Sir John Sydenhams Case *versus* Man in this Court, where words were, If Sir John Sydenham could have his will, he would kill, &c. And the Jury found that he spake these words, I think in my Conscience, if Sir John, &c. it was adjudged, that although the Verdict be different, yet because the matter in the Verdict was sufficient, the Plaintiff should recover, &c. So here, &c. And it was argued to the contrary for the Defendant, that the finding in the Verdict is so material a Variance, that there remains not matter sufficient in the Declaration to maintain the Action: First, they cannot be said to be counterfeit Jewels, because it is confessed by the Plaintiff, and so found by the Jury, that they were of the value of a 100 l. which is a competent value for good Jewels; and the value of a Jewel consists in the Estimation of him who will buy it; and to that purpose was cited 38 & 39 Eliz. in the Common Bench, Dampat *versus* Symfon. Secondly, because there was not in this Case any Warranty made ³ Cr. 520.

to

Post. 690.

Co. Lit. 56. a.

Anr. 197.

to the Plaintiff that it was a good Jewel, as 11 Ed. 4. 6. 7. H. 4. & 13 H. 4. 1. Thirdly, for that the deceit done unto the Plaintiff is found to be done by his servant; and the Jury find, that the Master did not command the Servant to conceal them to be counterfeit; and then by his general power to sell, the Master shall not be charged, if the Servant exceeds his power. Vid. 9 H. 6. 33. & Doctor & Student, 137. Fourthly, for that the Servant had but a power given him from his Master to sell, which power he cannot assign over to any other: Therefore for these material variances an Action upon the Case, being an Action founded upon the truth of his Case, which if it fail, the Action also perish, he conceived the Action was not maintainable: And to that opinion the Justices inclined, and principally for the third reason: and in Trin. 16 Jac. it was argued again by Davenport for the Plaintiff, who answered to that objection, that for the sale by the Servant, The Master ought to be responsible; and he said, that as the fraud in the Master was general, and his direction for the sale thereof; so he shall be answerable for the Damages which any particular person hath thereby; and compared it to the Case of 27 H. 8. 22. of a Ruse in a High way; and what is done by the Servant the Master shall not avoid, appears 9 H. 6. 53. & 11 E. 4. 6. Long. 5 E. 4. 17. Dy. 238. In this Case also the Masters receipt of the money for the Jewels, joyned with his precedent command, shall charge himself; for an assent subsequent without any precedent command shall charge him, as to his own Act. 2 H. 7. 17. 2 H. 4. 18. And as to that Objection, That there is such material variance betwixt the Verdict and the Declaration, that it destroys the Action; he said, that where many circumstances are alledged to induce an Action, and some part of them material, and some not, if so much be found by the Verdict to maintain the Action, it is good enough: Otherwise it is in an Assumpsit founded upon two Considerations; if the Jury find the one, and not the other, there the Action fails, because the Assumpsit is founded upon the total Consideration, as 27 H. 8. 24. Sir Thomas Coventry Solicitor General for the Defendant, and he vouched several Cases wherein the Master is not charged for the act of his Servant; and as to the Book of 9 H. 6. 53. urged against him, he said, that Fitz. N. B. f. 94. is otherwise, which is, That if one sell certain Pipes of Wine with warranty, and they are corrupt, Action upon the Case lies, which implies that it lies not without warranty; that may be reconciled, for as 11 E. 4. 6. is, if a man sell corrupt Victuals, Action upon the Case lies without warranty, because it is prohibited by the Law to sell corrupt Victuals; But in the same Case of Wine, if it be small Wine, and the party buys it for strong Wine, no such Action lies; and in this Case, although the Defendant commanded his Servant to sell, &c. it is not to be taken a sale in lawful manner, as 11 Ed. 4. & 9 H. 6. 51. 13 H. 7. 15. The Plaintiff also in this Case hath not alledged any legal Damage; for

For he ought to have alledged, that he was arrested and imprisoned after the Law of the Countrey of Barbarie; but if the Imprisonment were Tortious, then he hath not any legal damage, as 26 H. 8. 3. *Morin* an Action upon the Case, there ought in the original to be mention made of all the Causes, as 38 H. 6. is: But here be three material variances betwixt the Declaration and the Verdict, so as there cannot be any cause to maintain this Action, &c. *Doderidge Just.* if a Goldsmith makes Plate, wherein he mingles dross, so as it is not according to the Standard, and sends his Servant to a Fair to sell it, who sells it for good Plate according to the Standard; That an Action upon the Case lies against the Master; Ad quod Mountague assented; because it fails in the price in silver: But here it fails but in the value, for Jewels are sold by their valuation. (Note, This diversity pretii & valoris.) *Houghton Justice*, if one command his Servant to sell an ill horse, and the Servant sells him for a good one, whereby the Servant is arrested and indamaged, yet the Servant shall not have his remedy against his Master: And *Doderidge* cited a Case to be adjudged 33 Eliz. in the Common Bench; A Clothier of Gloucestershire sold very good Cloth, so that in London if they saw any Cloth of his mark, they would buy it without searching thereof; and another, who made ill Cloth put his mark upon it without his privy; and an action upon the Case was brought by him who bought the Cloth, for this deceit, and adjudged maintainable; and the Court in the principal Case inclined in their opinions against the Plaintiff.

Termo

Termino Paschæ,

Anno decimo sexto JACOBI Regis.
in Banco Regis.

Burwel *versus* Wood.

(1)

Covenant ; for that the Defendant covenanted by Indenture, whereas he had sold to the Defendant all his Cōpyhold Land in Framlingham, That if it all exceed the quantity of 8 acres (to be measured according to the proportion of sixteen foot and an half to every Pole) That he should pay for every acre over and above the 8 acres, (so to be measured) according to the said rate of 4l. for every acre : And alledgeth in fact, that the Cōpyhold Land was 12 acres measured by the said measurer : And for that he had not paid 16 l. for the said 4 Acres over and above the said 8 acres, he brought the said Action. The Defendant pleaded, that there were not 12 acres measured, &c. And Issue thereupon, and found for the Plaintiff : And it was moved in arrest of Judgment, that the breach was not well assigned, because it is not well alledged, that the Lands were admeasured ; for until measurement, the surplusage above the 8 acres cannot be known : And the Defendant hath not broken the Covenant, until he be required to pay, after the admeasurement, which ought to be notified unto the Defendant : Sed non allocatur ; for the Plaintiff might admeasure it privately, and he need not tell the Defendant when he admeasures it, but he taking upon him to demand so much, (whereas in rei veritate it is but so much) which the Defendant affirms, an Action well lies ; and here the Issue being, that they contained so much to be admeasured, &c. Which being found, it was held by all the Court, that the Declaration was good enough.

Ant. 432.

Ant. 391.

Harts Case.

(2)

HArt being Indicted in London, for a Rescous made to a Sergeant of the Peace, upon a Plaint in London : Upon Not guilty

guilty, it was found for the King, and a Fine assessed of 10 l. and imprisonment without Bail or mainprise, and to find Sureties for his good behaviour: And a Writ of Error being brought, the Error assigned was, because it was not vi & armis: Sed non allocatur; for although it were Error at the Common Law, yet it is made good by the Statute of 37 H. 8. cap. 8. Secondly, because it is not alledged, that he made the arrest by vertue of a Warrant, and then he had not any authority: But because the Indictment was, that by vertue of a Plaint before such a Sheriff, naming him, &c. he was lawfully taken or arrested, it is to be intended that he had a good Warrant; and therefore was well enough: Whereupon the Judgment was affirmed.

Ant. 345.

Co. 9. 68. a. b

Dent *versus* Parfo.

Replevin; The Defendant avows for 36 l. Rent for a year and half, being 25 l. by the year; The Plaintiff pleads payment of 12 l. And another Issue was brought for the 24 l. And for the first Issue it was found for the Plaintiff, and damages and costs taxed by the Jury; but it was found against the Plaintiff for the second Issue; and now moved, that the Juries finding of costs and charges for the Plaintiff, is void; for when part is found for the avowant, he shall have return, and damages and costs; and the return shall be for the Defendant, where any part is found for him: Wherefore it was adjudged accordingly. (3)

Marshal and his Wife *versus* Doyle.

Trespas by Baron and Feme, for breaking of the Close of the Baron, ad damnum eorum: And for this cause after Verdict, it was moved, that the Declaration was not good, nor aided by the Statute; and it was so adjudged. (4)

1 Cr. 553.

Ant. 355.

Post. 644, 655

Barmund *versus*

Action upon the Case, for saying, That he had two Bastards, and should have kept them: By reason of which words, discord arose betwixt him and his Wife, and they were likely to have been divorced: After Verdict, it was moved in arrest of Judgment, that these words were not actionable; because he doth not shew any temporal loss, as loss of marriage, or the like: But this imagination to be divorced, is not to any purpose, for it is but a causeless fear; and of that opinion was all the Court: Wherefore it was adjudged for the Defendant. (5)

1 Cr. 322, 436;

Furnis *versus* Leicester.

(6)

A'nt. 197.
3 Cr. 44.

Action upon the Case; for that the Defendant falso & deceptive sold unto him such a day 220 Sheep, affirming, that they were his own Sheep, ubi revera they were the Sheep of J. S. The Defendant pleaded Not guilty, and found against him: And it was moved in arrest of Judgment, that the Action lay not; because he doth not shew, that the Defendant had committed any offence in affirming them to be his; and he doth not shew that he had any damage, or that J. S. had re-taken them, or sued him for them, as 42 Aff. 8. Sed non allocatur; for the sale of goods which were not his own, but affirming them to be his goods, knowing them to be a strangers, is the offence, and cause of the Action; and if he should tarry until the goods were taken from him again, it might peradventure be mischievous unto him, and he should be without remedy: Wherefore, absente Montague, it was adjudged for the Plaintiff.

Kirkman *versus* Thompson.

(7)

Post. 624.
Moor 93.
1 Cr. 244.

Ejectione firmæ: Upon a special Verdict the Case was such; One Richard Greycroft was seised in Fee of the Land in question, and by Indenture covenanted with Richard Boles as well in consideration of 200 l. paid by the said Richard Boles, as in consideration of a Marriage betwixt Leonard his Son, and Ann the Daughter of the said Richard Boles, to convey the Land to the use of the said Leonard and Ann, and the Heirs of the Body of the said Ann to be ingendred, and to his right Heirs; the Marriage takes effect; the Father dies before the assurance, Leonard in performance of his Fathers Covenant makes the Assurance accordingly; afterwards they have Issue Richard the Lessor; and afterwards Leonard infeoffed one Woodroff, and Leonard and his Wife levied a fine to the said Woodroff, under whom the Defendant claims; And Richard Greycroft enters as for a forfeiture by the Statute of 11 Hen. 7. And whether this entry was lawful or not, was the question. First, this being a Conveyance as well made for money for the Father of the *Feme*, as for a Marriage, not being found expressly to be a jointure, whether it shall be said to be a jointure within the Statute of 11 Hen. 7. And it was resolved, that it should; for the Conveyance being by the *Baron* or his Ancestor in consideration of a Marriage, although it be conjointed with a consideration of money, is within the Statute, and it shall be expounded as a Jointure within the letter and mention of the said Statute. Vid. 3 & 4 Ph. & Mary, Dy. 146. & 248. Secondly, it was moved, whether this were an Estate Tail

Tail in the *Feme* only, or in the *Baron* and *Feme*; for if it be an Estate Tail in the *Baron* as well as in the *Feme*, then it is clearly a good alienation out of the Statute; and it was an Estate Taile in the *Feme*, and but an Estate for life only in the *Baron*. Thirdly, (which was the principal question) this being a joyn-
Lit. Sect. 28.
 ture within the Statute, whether the alienation by the *Feme* with her first Husband who limited it, be a forfeiture within the Statute; for it was moved, that this Statute intended to provide for the Issues of such *Femes* who are inheritable to the said Entail, and it is as an advancement settled by the Ancestor of the *Baron*; and therefore although the first *Baron*, who made the limitation, joyned in the assurance, he having but an Estate for life, it shall be a forfeiture in the *Feme*: But it was resolved by all the Court, that it was not any forfeiture within the words, nor within the intent of the Statute: Not within the words, for the words be, If any Woman being sole, or with any after-taken Husband, &c. And here she was not sole, and this Husband who conveyed it, is he who was Married to the *Feme* before the conveyance: But Doderidge said, if that conveyance had been a conveyance by the Father to the *Feme* before Marriage, and afterward she had taken the Son to *Baron*, it would peradventure have been a more difficult question. Secondly, it was held to be out of the intent of the Statute, because
Co. Lit. 365. b.
 the *Baron* who made the assurance, joyned with the *Feme* in the alienation; and this Statute being in restraint of the Common Law, is to be taken strictly; and the Statute did not intend but to provide, that disinherison shall not be to the Heirs of the Husband contrary to his intent; but here this being with his intent, may well stand with the Statute; and is not any alienation against the purview thereof: Wherefore it was adjudged for the Defendant. Vid. Co. Rep. lib. 3. fol. 50. Browns Case, and fol. 60. Lincoln Colledge Case, and Plow. 463, 464.

Hingen *versus* Payn.

DEbt upon an Obligation of 400 l. conditioned for the performance of Covenants in a Lease; the Defendant pleads
(8)
2 Rol. 428, 465.
 performance generally; the Plaintiff shews, that the Lessor by Deed enrolled, within the six months, bargained and sold the Reversion to J. S. and T. D. And there being a Covenant in the Lease, that the Lessee at Michaelmas (being the end of the Term); or after upon request, should deliver the Possession to the Lessor, his Heirs or Assigns; he alledgeth for breach, that J. S. and T. D. the next day after Michaelmas came unto the House, and
 required

Ant. 63.
Ant. 407.

Ant. 146.

required of the Defendant the delivery of Possession, and he had not delivered the Possession : And Issue being upon this request, the Jury found, that the said I. S. onely came and required the Possession, and he did not deliver it, &c. The finding of the demand made by one, is not warranted by this Issue : Sed non allocatur ; for they two having but one Title, the demand by one of them is the demand of both, and the delivery of the Possession to one, had been the delivery to both ; wherefore it was a good demand, and the Issue well found. Secondly, it was moved, that the breach assigned was not sufficient ; because he doth not shew that the two Bargainees gave notice unto the Defendant, that they had the Reversion by bargain and sale ; and without notice the Tenant is not bound to take Consuance thereof, nor can they take advantage of any Condition for Non-payment of the Rent, no more can they of this Obligation to deliver Possession : Sed non allocatur ; for being the Condition in a Bond, it is at his peril to take notice, being obliged to deliver it to him or his Assigns ; and this request by the one is sufficient : Wherefore it was adjudged for the Plaintiff.

Turnman *versus* Cooper.

(9)
2 Cr. 66, 68.

Co. Lit. 21. a.
Co. 8. 154. b.
Perkins 170.

Co. Lit. 21. a.

E Jectiōe firmæ : Upon a special Verdict, the Case was ; One by Deed gave Lands to Baron and Feme, and to their Heirs, habendum to them and the Heirs of their bodies, Remainder to them and the survivor of them for his life, to hold of the Chief Lord with a warranty to them and their Heirs : And whether this were an Estate Tail, and a Fee expectant, or only an Estate Tail, was the question ; for the Donees are dead without Issue, and the Plaintiff claims under the Heir of the Donor, and the Defendant claims by the Devise of the surviving Donee. And after argument it was adjudged, That it was an Estate Tail with a Fee expectant ; for first, it is given in Fee, and the habendum, although it limits an Estate Tail, doth not limit the Estate to any other, so the Fee remains as at the first it was limited ; and this enforced by the tenure limited to the Lord Paramount, which cannot be if it were an Estate Tail : Also the warranty being to the Donees and their Heirs, shew the intent to be, that they should have Fee ; and then the office of the Judges is to expound, that all the words of a Deed should be effectual, if it might be ; and by this construction all the parts of the Deed should stand together : Wherefore it was adjudged for the Defendant. And they held, that there was a difference, when the limitation is in one and the same sentence, as a gift to one and his Heirs, Si hæredem de carne sua habuerit, as 37 Aff. pl. 15. is : Where a gift to one and his Heirs, Si hæredem de corpore suo habuerit, is an Estate Tail only, because it is one and the same sentence : But when the limitation is first absolute, and after

after the limitation in the Habendum is to her and the Heirs of his body, and doth not limit the Estate over to any other, that stands well with the first, and both shall stand. Vid. 21 H. 6. 7. 45 E. 3. 20. Perkins 35. Wherefore it was adjudged for the Defendant.

Travers *versus* Gerrard Malyns.

DEbt for 50 l. upon a Lease for years; The Defendant pleaded Letters Patents of Protection dated 5 Jac. Reciting, (10)
whereas he was indebted to the King in 200 l. The King for the 2 Rol. 135, 329;
more speedy payment of his Debt, received the said Garret Malyns into his Protection, and that none should meddle with his person or goods, or sue nor implead him in any Court for any Debt or Trespas, &c. until the King were satisfied; and so demanded Judgment if he should be enforced to answer: And it was thereupon demurred; first, because Gerrard Malyns is impleaded, and this Protection is of Garret Malyns, so another person: But it was alledged, that they be one and the same person, and cited some Authors and authority to that purpose. Secondly, it was alledged, that by the Statute of 25 Ed. 3. these Protections are expressly, 2 Rol. 135;
that none shall be delayed upon them, but the party shall answer Ant. 425.
and go to Judgment, but Execution shall stay: And for this cause St. 25. E. 3.
the Court here held, that this Protection is not allowable; but C. 19.
when it came to Execution they would advise: 3 Cr. 290.
Whereupon it was ordered that he should answer. Co. Lit. 131. h

Thomas Harrington *versus* Sir William Garraway, Cujus principium ante Page 424.

DEbt upon a Lease for years made by Sir John Harrington (11)
to the Defendant; and that afterwards he was bound in a Statute to the Plaintiff of a 1000 l. And that this Reversion and Rent were delivered in extent: Wherefore he took it by the extent, unde actio accrevit; the Defendant pleaded a former Statute to Sir W. Cockeyn of 2000 l. and that this Reversion and Rent were extended upon that Statute: Wherefore, &c. the Plaintiff replies, that Sir William Cockeyn, after the Statute made unto him, and the Statute made unto the Plaintiff, had taken a Lease for years of the Reversion, so he had suspended his Statute; and Issue thereupon, that Sir John Harrington demised unto him this Land, and found for the Plaintiff, quod demisit: Now Noy moved in arrest of Judgment, That this is no cause to give the extent to the Plaintiff, nor can he avoid the Extent of Sir William Cockeyn; but upon this matter, if there should be cause to avoid the Extent, he ought to have brought an Audita querela to avoid it, and not otherwise; for that he is in, by matter of Record, as 17 Aff. pl. 45 Ed. 3. and other Books, That a Sta-

Co. 4. 65. b

Statute being of Record, cannot be avoided but by matter of Record; Sed non allocatur; For when the Plaintiff had once lawfully extended, and the Land delivered him in extent, he may avoid in this Action by Plea, the extent upon the former Statute, and shall not be put to an Audita querela; for the second Extent never was lawful, but was suspended by taking the Lease; and then the Plaintiff having well extended, may well maintain this Action: Wherefore it was adjudged for the Plaintiff. Vid. postea 569.

Hunt *versus* Dowman. Trin. 15 Jac. Rot.

(12)

Halt. 524. 1. Salt. 19. 20

Action upon the Case; whereas the Defendant being Lessee for years, the Reversion in Fee to the Plaintiff (and shews how) the Plaintiff coming to the House to see if any waste was committed therein, or any defect in the Reparations, that the Defendant disturbed him, and would not suffer him to enter and view the waste; by reason whereof he is without remedy to punish the same: After Verdict for the Plaintiff, upon Not guilty pleaded, it was moved in arrest of Judgment, that this Action lay not; First, because it was not shewn that waste was done, so as it might appear to the Court, that there was cause of Action of Waste. Secondly, that it was never seen before this present, that such an Action had been brought; and therefore it is not allowable. But all the Court held, that the Action was maintainable; For to the first Objection, the Law will not presume that he can come to a precise knowledge what Waste is done without a view; and therefore shall not be bound in this Action to assign or to shew it in particular. And they all held, that this Action well lay, for otherwise none might ever have an Action of Waste, if he might not shew in what place the Waste is, to assign the Waste in specie: And as the Law gives to the Lessor, or to him who hath the Reversion, liberty to enter, to see if there be Waste, to the intent he might have his Action, if there were cause: So if he be disturbed in his entrance and view (which is the sole means to have remedy) the Law will not leave him without remedy to punish that wrong, and therefore gives him this Action: Wherefore it was adjudged for the Plaintiff.

Pollard

Pollard *versus* Blight.

Error of a Judgment in the Common Bench, in Trespass⁽³⁾ of Assault and Battery in London, where the Defendant pleaded *de son assault demesin*, and found against him, and Damages assessed to 213 l. 6 s. 8 d. And Judgment for the Plaintiff; and Error thereof brought, and the Error assigned, that whereas Midd. and the City of London are several Counties, and every original Writ ought to be directed to the Sheriff of the County where the cause of the Action ariseth; Et quælibet Actio & narratio fundata super tali brevi locari debuit in eodem Comitatu in quem breve originale emanavit; and whereas the Trespass whereof tulit breve suum transgressionis, per idem breve supponitur fuisse apud London, nihilominus the Writ was directed to the Sheriff of Midd. Et nihilominus it appears by the Record, that upon the Defendants appearance in the said Court of Common Bench, at the Suit of the Plaintiff in placito prædicto, the Plaintiff declared against him in placito prædicto, & Actionem locavit in London, and complained of a Trespass in London, prout appears by the Record; Notwithstanding the Writ original prosecuted in placit. super quo narratio fundata fuit direct. ivit Vicecomit. Midd. absque aliquo alio brevi originali ad narrationem illam warrantizandum, & sic Actio & narratio prædict. versus Defend. impetratur in alio Comitatu, ubi breve originale emanavit. And so there is a manifest variance betwixt the Writ and the Declaration, and the Declaration is vicious, and the Judgment thereupon erroneous. And he further said, that the said Writ was returnable, and returned Trin. 13 Jac. and continued usque Term. Mich. which Writ and continuance upon them were never certified; wherefore he prayed a Writ to the Lord Hobart, to certifie the continuances, and to Thomas Spencer Custos brevium, to certifie the Writ, which was in this manner, Vic. Midd. salutem, &c. Si Henricus Pollard fecerit te securum, &c. tunc pone, &c. Willielm. Blight quod sit coram Justiciar. &c. quare vi & armis apud London in ipsum Henricum insultum fecit, &c. And upon return in Hill. Term. that the Plaintiff obtulit se, &c. the Defendant appeared, and upon the Capias returnable quind. Trinitat. and after an alias Capias returnable. Octab. Mich. The Defendant thereupon prayed a Scire facias ad audiendum Errores, & super hoc the Defendant in the Writ of Error pleaded, In nullo est erratum; and thereupon being moved in Court, it was said, That this Writ in Midd. is no Writ to warrant the Declaration in London, and then after Verdict the want of an original is helped by the Statute of 18 Eliz. But the Court held it was Error; for true it is, that where there is no original, it is holpen by the Statute; but a vicious original is not helped: And it being here shewn and assigned for Error,

(3)
 St. 18 El. c. 4.

Ant. 108.
 1 Cr. 281. 2.
 Post. 655.
 Post. 675.

that

that this was the original in this Plea, and this original is certified as an original upon this Plea, which is vicious, and doth not warrant the Declaration, it being variant from it; wherefore for this cause the Judgment was reversed: for the Court is certified that this is the Writ in this Plea betwixt the same parties, and the Court will not intend another Writ, or that it was without Writ.

Dominus Rex & Parker versus Webb.

(14)

INformation by Parker for the King and himself, against Sir John Webb and his Lady upon the Statute of 23 Eliz. for that the *Feme* being of the age of 16 years did not repair to any Church or Chappel to hear Divine Service at any time within 11 months last past; wherefore he demanded 220 pound, and prayed to have the third part thereof for himself, according to the Statute. The Defendant pleaded, That this Information being upon the Statute of 23 Eliz. Another Statute was made Anno 28. whereby it was Enacted, That every Offender in not repairing to Divine Service, who hereafter shall be thereof once convicted, shall in such of the Terms of Easter or Michaelmas as shall be next after such Conviction pay into the Receipt of the Exchequer after the rate of 20 l. for every month, which shall be contained in the Indictment whereupon such Conviction shall be had; and if default of Payment be made, that the Queen shall take, seise, and enjoy all the Goods, and two parts of the Lands and Leases of such Offender: And it was thereby further Enacted, That upon the Indictment of such an Offender, a Proclamation shall be made at the same Assise wherein the said Indictment shall be taken, whereby shall be commanded, that the body of such Offender shall be rendered to the Sheriff of the same County, before the nex Assise or Goal delivery; And if at the next Assise or Goal delivery, the same Offender so proclaimed shall not make his appearance of Record, that then upon such a default recorded, the same shall be as sufficient a Conviction as if it had been tried by Verdict: And they shew, that the *Feme* was convicted upon such a Proclamation, and demand Judgment, if the Informer ought to maintain this Action; whereupon the Attorney General demurred: The point solely is whether a *Feme Covert* being convicted by the Indictment at the Kings Suit, liable to the Suit of an Informer upon the Statute of 23 Eliz. after the year that she was convicted: In the decision of which question, there are three Statutes to be taken notice of, and considered; First, the Statute of 23 Eliz. whereby it is Enacted, That every one who is absent for a month shall forfeit 20 l. for the month, being inde legitime convictus, to be demanded in any Court of Record within a year after. Secondly, the Statute of 28 Eliz. which provides further, that if a man be
once

once Endicted for Recusancy, this Endictment shall be good for the forfeiture, and that the Offendor shall forfeit by the month until such time as he conform himself, &c. Thirdly, upon the Statute of 35 Eliz. which ordains, that the forfeitures may be recovered by the Quæn by debt, &c. Whereas before there was not any remedy for the Quæn to recover the entire, but by Endictment; And this Statute of 35 Eliz. doth not repeal the former Acts, being in the affirmative; In proof whereof was cited, Dyer fol. 19. Lessee for years ought to take Hedgboote by assignment, yet he may take it without assignment; for the affirmative doth not take away the power which the Law gives him; So upon the Statute Gregories Case, Co. 6. Rep. fol. 19. & 20. And upon these Statutes of Recusancy, the remedies be Cumulative, and not privative, as by the Statute of Westm. 2. cap. 20. of Elegit, The King may take his Execution after the Statute, he may sue by Exchequer-process, if he please, for he is within the Statute for his benefit, but not for his disadvantage. Vide Co. 6. 45. and Co. 11. 66. And whereas it hath been objected, that the King by this Suit by the Informer shall be a loser, because now he is to have but the third part, whereas before he was to have all, after the husbands death; It was thereto answered, that the Law respects a present benefit more then a future possibility, Co. 5. 25. And to prove the Kings Prerogative in such cases, were cited 18 Ed. 3. Scir. fac. 10. If the King bring an Action, and the party dies, his Writ shall not abate; And 30 H. 6. 2. 12 H. 7. 12. 11 H. 7. 1. & 7 Ed. 6. Bro. new Cases, Pl. 439. If an Information be exhibited in the Exchequer by a common person for the King, and the Defendant pleads in Bar, and traverseth the Information: The King may Traverse the matter of the Bar, if he please, and is not bound to maintain the matter contained in the absque hoc, &c. Vide Title Outlawry pla. ultimo. Wherefore, &c. But on the contrary side it was shewn by George Croke, that by the Statute of 35 Eliz. there is not any new penalty given, but a remedy only for the ancient; Et nemo debet bis puniri pro uno delicto; And if the Husband should be new charged, and the King after the death of the Husband should seise the Goods and Lands, she had not any remedy: For she cannot have an Audita querela against the King; And Green and Edwards Case, Hill. 36 Eliz. where an Information was brought for the cutting down of 2000 Trees: The Defendant pleaded, that at another time one J. S. had brought an Information for the same matter: And it was demurred thereupon, and adjudged against the King; The reason there given, was, because an Audita querela lies not against the King: And he agreed to all the Cases before cited, touching the Kings Prerogative, but it doth not extend to charge a man twice for one offence, for that would be injustice; And he said, that when the party is convicted at the Kings Suit, it is so appropriated to

Co. 11. 62. a.

1 Cr. 172.

Co. 11. 62. b.

Post. 529.

Hob. 173.

Co. 5. 25. a.

Co. 11. 66. a.

3 Cr. 325. 6.

3 Cr. 261.

the King as no other may meddle therewith; And to that purpose he vouched Doctor Fosters Case, Co. 11. 65. & 34 Eliz. Hartings Case, where an information was exhibited upon the Statute of 5 Ed. 6. for buying of wolls; and afterwards another informed against the same party to have the speedier execution for the King; And adjudged that he could not; and 4 Jac. Ormsdich informed against a Papist after conviction, and adjudged that it lay not; (But note that was not in Case of a *Feme Covert*) And in Trin. 14 Jac. in the Common Bench Rot. 2582. Threeles Case, and Trin. 14 Jac. 2390. in the same Court accord: And whereas it hath been objected, that she being a *Feme Covert*, is not to be charged; He thereto answered, that the Husband is not charged, but in respect of his *Feme*; and therefore the person of the *Feme* being discharged, shall discharge the Baron also: And Charnock and Woorsleyes Case in the Kings Bench, 31 Eliz. was cited, where Baron and *Feme* seised of Land in right of his *Feme* (whereof the Baron was entitled to be Tenant by the Courtesie) levied a Fine thereof, the *Feme* being within age; and upon Error brought, adjudged, that it should be reversed for both, and that the Baron should re-have it: so as the Fine was utterly avoided; Also in case where the *Feme* is convicted of Recusancy, it is usual to seize the Lands and Leases which her Husband hath in her right by Exchequer-process; and therefore lately in the Exchequer, the wife of one Wood being convicted, there was seizure made of the Lands and Tenements, and also of her Leases, &c. Montague chief Justice agreed, that if she had been a *Feme sole*, it had been a good Bar; But in this case he inclined against the Defendant: Et adjournatur.

Post. 529.

Sir Francis Fortescue *versus* Markham, Pasch. 12 Jac.

Rot. 347.

(15)
1 Rol. 869.

ERror of a Judgment given in an Assumpsit; The Error assigned was, that he, the now Plaintiff, at the time of the said Markh. bringing his action against him, was, & yet is a Knight of the Bath, in which case the then Plaintiff ought to have brought his Bill against him by the name of Francis Fortescue Knight of the Bath, and not by the name of Knight and Baronet: But forasmuch as he hath appeared to that name, and pleaded thereto, he hath concluded himself; and so the Judgment was affirmed by seven Justices at Serjeants-Inn in Fleetstreet.

1 Cr. 104. 371.
Ante 125.Mingay *versus* Hammond.(16)
1 Rol. 434.
Jones 215.

ANnuity, pro consilio impendendo, brought by Mingay, a Bench-er of the Inner-Temple against Hammond, and demand 6l. being the arrearages for three years: The Defendant pleaded in Bar, that he had divers injuries offered him, &c. for which he intended to exhibit a Bill in the Star-Chamber, and that a Bill was drawn accordingly, which he brought to Mingay, and intreated him to put his hand to it, and he refused; Whereupon he ceased his annuity, supposing that by this denial, the annuity was determined: Upon this plea, the Plaintiff demurs; And the opinion

on

* It is so said in 1st Rep. 36.
that the Husband was inhibited
by the Court.

on of the whole Court without argument was, that it was an ill plea, because a Councelloz (who hath such a fee) is not bound to put his hand to every Bill, but only to give counsel; And day Jones 294. was given to shew cause why Judgment should not be given for the Plaintiff.

The Lord Chandois Case.

Two men riding over the river of Trent, were drowned by the violence of the water; It was moved for the King that their Horses should be Deodands, and denied per totam curiam. (18)

Hurford *versus* Pile, Mich. 13 Jac. Rot. 543.

Assumpsit: Whereas J. S. was in Execution for 40 l. The Defendant said, Deliver J. S. out of Execution, and what it cost you I will repay; wherefore J. S. was discharged by the Plaintiff: The Defendant for plea saith, that after the Assumpsit, and before the Plaintiff had done any thing in that business, he forbade him to meddle therein, and that he would not stand to his promise; whereupon the Plaintiff demurred; and it was adjudged for the Plaintiff; For Houghton Justice said, that a man may discharge an Assumpsit made unto himself, but he cannot discharge an Assumpsit made by himself: But at another day, the Defendants Counsel moved, that it was a good plea, and that as long as nothing was done, it was but an Executory promise: Doderidge, if I promise to J. S. that if he build an house upon my Land before Mich. I will pay him 100 l. and I countermand it before he hath done any thing concerning the house, It is a good countermand: Houghton *contra*; but he said, that may be considered in damages; Et adjournatur: And afterwards in Trin. Term, Judgment was given for the Plaintiff. (19)

1 Cr. 384.
Post. 620.

The Bishop of Carliles Case.

Prohibition was prayed upon the Stat. of 23 H. 8. cap. 9. For that the Bishop of Carlile, having a Commendatory within his Diocese, libeld for Cythes in the Court of the Archbishop of York, and hanging that suit, died, and the Executors of the Bishop revived that suit: Doderidge Justice, the question is, if a suit being lawfully commenced in the Archbishops Court, shall afterwards be prohibited as illegal; and in this Case, although the cause cease, yet the suit shall continue; For by the civil Law, the death of the Plaintiff or Defendant is not any abatement of the libel; But they have a reviver, as we a resimmmons in ravishment of Ward, And where a Court is once lawfully possessed of a cause, and have Jurisdiction, it would be hard to grant a Prohibition: Also posito, that they in the Archbishops Court have examined their witnesses, so as the cause is *causa conclusa*, and they would not hear any more examinations, but are ready to give sentence, The intent of the Statute is not, that such a cause should be remanded, whereby the Plaintiff should lose the costs of his suit; And the Prohibition was denied per totam curiam. (20)

1 Cr. 97.
Ante 429.

Termino Trinitatis,
Anno decimo sexto JACOBI Regis
in Banco Regis.

Sir John Carews Case.

- (1) **C**ertiorari was prayed to remove Endiements taken in Wales of Riots, and it was granted; there being divers Presidents to that purpose; (as the Clerk of the Crown informed the Court) And Doderidg Justice said, that if Debt be brought against one in London, and the Defendant afterwards removes and inhabits in Wales, a Capias ad satisfaciendum may be awarded against him into Wales, or into any County Palatine, and that the Register makes mention of a Certiorari to remove a Record taken at Calice.

1 Cr. 332.
1 Roll. 395.

Ifon *versus* Grey.

- (2) **I**n Debt, The Defendant pleads outlawry in the Plaintiff; The Plaintiff saith, *Nul tiel Record*: And the truth was, that at the time of the plea he was outlawed, but before the day assigned for bringing in of the Record, it was reversed: The Court ordered a *Respondes ouster*, Dy. 228.

Co. 8. 142. b.
1 Cr. 566.

Sir John Tasburgh *versus* Day, Trin. 15 Jac. Rot. Suff.

- (3) **A**ction upon the Case; Whereas he is, and for these two years last past was a Justice of Peace in the County of Suffolk, and whereas upon the seventh of March, and long before, he was seised in Fee of the Advowson of Sandcroft, in the County of Suffolk, and intended to sell it towards the payment of his debts; That the Defendant knowing the premises, intending to slander him in his Religion, and to cause him to be reputed as a Papist, and unworthy the Government, and to slander his Title to the Advowson, and to hinder his sale thereof, and to cause him to incur the pains in the Statutes imposed upon Recusants, the aforesaid 7. Martii, 14 Jac. having communication with divers persons touching his Title to the Advowson, and concerning his opinion in Religion, spake of the Plaintiff these scandalous words, True it is, that Sir John Tasburgh was the true and undoubted Patron of Sandcroft, but now he hath lost that Patronage and Presentation, by being a Simonist and a Recusant; both which I will prove him to be: By reason of which words he was slandered in his good name, and hindered in the sale of the Advowson. The Defendant

dant pleaded Not guilty, and found for the Plaintiff, and Damages to 100 l. And it was moved in arrest of Judgment, that this Action lies not : For he doth not shew that he had any prejudice by the flandering of his Title ; nor doth he shew, that there was any communication to sell it unto any, nor that any who intended to buy it, was thereby hindered in his buying ; And without some special cause shewn the Action lies not ; And for the words touching his person, they be not actionable, for they do not touch him in his Office of Justice of Peace, nor is there any Damage unto him by the speaking, whereof the Common Law takes any Conusance ; And of that opinion was all the Court, that the Action lay not ; Wherefore it was adjudged for the Defendant.

Ante 391.

1 Cr. 485.

Hodges *versus* Robert Marks sen. and Robert Marks jun.
Trin. 13 Jac. Rot. Somerset.

Action upon the Case ; Whereas William Pawly senior and William Pawly junior, were indebted unto him by several Bonds in 35 l. and to obtain this Debt he procured a Latitat out of the Kings Bench, directed to the Sheriff of Somerset to arrest them ; And shews the course of the Court, that upon appearance, Bail shall be put in : Whereupon he declares, &c. And that the Sheriff made a warrant to Philip Perry and others to arrest them, who by vertue thereof arrested W. Pawly junior ; That the Defendants rescued him, whereby he escaped, and went to places unknown, so as he lost his Suit, &c. The Defendants pleaded Not guilty, and a special Verdict found this matter, viz. The Debt due to the Plaintiff, the prosecuting of the Latitat for this cause, the making of the warrant thereupon to the Sheriffs, &c. And further, they find that the said W. Pawly was also indebted to Philip perry senior, and that he sued a Latitat against him, who made also a warrant to the same Bailiff to arrest him at the Suit of the said Philip Perry senior ; That it was directed unto them conjunctim & divisim, that they were not known Bailiffs, that upon 8. Jan. 12 Jac. in the night about six of the Clock they entred into the House of Robert Marks senior, the dooz being open, and William Pawly being there present, the said Philip Perry junior laid his hands on him, and then having both the warrants in his pocket, said unto him, Here I do arrest you by vertue of a Warrant that I have, but he did not shew unto him the Warrant, nor had it in his hand, nor told him at whose suit he arrested him ; and that William Pawly did not demand to see the Warrant, nor at whose suit he was arrested, and that the Defendant rescued him from the Bailiffs ; and he escaped ; Et si super totam materiam, &c. And it was first resolved, that this arrest without shewing the Warrant, and without telling at whose suit, until the other demanded, was legal

(4)

2 Rol. 277.9.

1 Cr. 538.

2 Rol. 479.

1 Cr. 75, 109.
248.
Ante 419.

gal and well enough, and that he needed not shew the warrant, until the other obeyed, and demanded it. Vide Co. lib. 9. fol. 68. 9. in Mackalleys Case, & lib. 6. fol. 54. Countess of Rutlands Case, Secondly, that this arrest in the house, the door being open, and at six of the clock at night, was good enough against the party arrested, and the rescuing him was utterly unlawful. Thirdly, that this arrest without having the Warrant in his hand, and having both Warrants about him, was well enough, although he did not shew by which of the warrants he arrested him; For he being under the Bailiffs arrest, is in custody there, for all causes for which the Sheriff had made his Warrants against him, although the Sheriff or Bailiff do not mention any specially. Vide Co. lib. 5. fol. 88. Garbons Case, & fol. 89. Frosts Case. Fourthly, it was held, that for this rescous, the Plaintiff, at whose suit the arrest was, may maintain an Action very well; For he hath the loss, and cannot have his Action against the Sheriff, and therefore it is reason he should have his Action against those who did the injury to him, whereby he lost his process, and his means to recover his Debt, as it was lately here adjudged in the Case of May and Proby: Whereupon it was adjudged for the Plaintiff. Vide 16 Ed. 3. 4.

Mills *versus* Astel.

- (5) **E**RROR of a Judgment in Northampton, in a Writ of Covenant; The Error assigned was, that the Declaration there was ill; because he declares of a covenant, whereby the Defendant covenanted to find the Plaintiff with meat, drink, apparel, and other necessaries, and doth not shew in particular what other things were necessary; And the breach was assigned as general 'as the covenant, viz. that he did not find him with meat, drink, apparel, and other necessaries; And doth not shew in particular what other things were necessary, so as the Court might adjudge whether it were necessary or not: And for that cause all the Court held that the Declaration was ill, and the Judgment there being given by Nihil dicit, and entire Damages assessed, the Judgment was reversed.

Ante 171.

But v. 3. Lev. 90.
confrJohn Witton *versus* Bye.2 Rol. 404. 6,
7, 8.

- (6) **D**EBT as Administrator of Witton, and demands twenty five pound; For that George Witton was possessed of a Lease for years, and 2 Jac. assigned that Lease to the Defendant rendring annually during the Term 50 l. at the Annunciat. and St. Mich. and for 25 l. due at Mich. 15 Jac. the Action was brought; The Defendant pleaded, that George Witton 5 Jac. released unto him all Actions, Debts, Duties and Demands, before the date of that Release; whereupon the Plaintiff demurred: And it was now

now moved, that this Duty being accrued after the Release, and being a future Duty, was not discharged by this Release; no more than if the Lessor should release unto his Lessee for years, all Actions and Demands: That is no bar to the Rent which accrues annually, by reason of the profits received, because every year is quasi a new Duty. And of that opinion was Houghton clearly; For the Rent goes with the Reversion; and this Rent being annexed to the Reversion, and attending it, is due annually by reason of the perception of the profits; and therefore differs from the Case in Littleton 117. of a Release of all Demands, which is a good bar of a Rent-service, or Rent-charge. But in this principal case, Houghton and all the Court agreed, that soasmuch as the Lessee had assigned over all his term, reserving this Rent, It is not attendant on the Reversion, but is only due by contract; and this Release of all Demands dischargeth this Contract, and all demands concerning it: Wherefore the Release was a good bar for the Rent incurred after. Vide 20 Ass. Pl. 5. Co. lib. 8. fol. 154. a. Althams Case, Co. 5. fol. 701. a. Hoes Case, Dyer 217. Vide 4 Jac. betwixt Harcourt and Field; Release of all Demands is no bar in an Action of Covenant afterwards broken.

Sect. 510.

1 Vent. 314.

Ante 171.

2 Rol. 408.

Ante 170.

Whilster *versus* Pallow.

REplevin: Upon a special Verdict the Case was; William Hyde being seised in fee of the Mannor of Elvedon, where- (7)
of the place in question (being twenty acres of Coppice-woods) is
parcel, and where divers timber-trees and others were sparsh
growing within the Mannor, made a Lease of the Site and De-
mesne of the Mannor, Exceptis & semper reservat. omnibus boscis,
subboscis, Coppices & Hedg-rows, which then were, or any time
after, during the term, should be in or upon the Premises, or any
parcel thereof, with free ingress to sell, take, and carry away the
same at his will and pleasure, so as he leave sufficient fire-bote,
hedge-bote, plough-bote, &c. to be taken and spent upon the Pre-
misses, to Thomas Martyn and his wife during their lives, with
liberty to take the said botes, &c. And whether the soil of this
twenty acres were let to the Lessee, or excepted to the Lessor,
was the question; the Issue being, whether it were the Free-
hold of Pallow, who had purchased the Inheritance of the Man-
nor: And after the first Argument at the Bar, without any dif-
ficulty, It was adjudged, that the Soil it self was excepted, and
that it passed not with the Fee. And this difference was taken
betwixt the exception of Wood and Under-wood, and the ex-
ception of all Timber-trees: For in the first, the Soil it self
of the Wood and Under-wood, and what is known by that
name, is excepted; but in the last Case, no Soil is excepted,
but only so much as is sufficient for the vegetature and growing

2 Rol. 455.

Post. 524.

or

of the *Cræes* excepted, 3 H.6.45.46 Ed.3.22. Dy. 19. & 79. Co. 5.
11. Ives and Sams. Case, and Co. 11. fol. 49. b. Lyfords Case.

Lee versus Fydge.

- (8) **D**Ebt upon an Obligation of 60 l. conditioned, Whereas John Fydge was become Apprentice to the Plaintiff, if he at any time during his Apprenticeship imbezelled or consumed any of his Masters goods, That if the Defendant within thre months after proof thereof made, by the confession of the said John Fydge, or otherwise, and notice thereof given, should make sufficient recompence for all such things so imbezelled; that then, &c. The Defendant pleaded, Quod nulla probatio facta fuit, by the confession of the Apprentice, or otherwise, that he consumed or imbezelled any of his Masters goods, &c. The Plaintiff replies, that such a day and year, probatio facta fuit, that the said John Fydge had imbezelled 4 l. of his Masters; and that the same day the Plaintiff gave notice thereof to the Defendant, and that he had not satisfied; And hereupon the Defendant demurred; first, Because it is not alledged in facta, that he imbezelled so much; and without alledging it, there is not a sufficient breach assigned; For the condition is, that if he imbezel, and it be sufficiently proved; so it is not sufficient to say that proof was made, but he ought to alledge precisely in facta, that there was such an imbezelling; for proof is not material, unless such a thing were done. Secondly, It is not alledged how the proof was made, which ought to be of necessity in this Action; For the Defendant hath thre months after proof, and notice, to make satisfaction; And of that opinion was the whole Court: And rule was given, that Judgment should be entred accordingly for the Defendant. But afterwards the Court gave day until the next Term, and licence to the Plaintiff to discontinue his Suit, otherwise he should be utterly barred of his bond. Vide 10 Ed. 4. 11. 15 Ed. 4. 25. 7 Rep. 2. Bar. 245. Vide ante the Case betwixt Gold and Death.

Hob. 217.

Ante 35. 281.

Ante 381.

*Barbara Wood versus Sir John Shurley and his Wife,
late Wife to Sir Henry Bowyer.*

- (9) **E**rror of a Judgment in the Common Bench in Dower, of the Dower of Sir Henry Bowyer; where the Tenant pleaded, that Sir Henry Bowyer was seised in fee of the Manor of W. and infeoffed J. S. and J. D. to the use of himself and his Feme for their lives, without impeachment of waste; the remainder over, which was for Joynture to his Feme; And after he died, and the Feme entred, claiming it for her Joynture: Et hoc, &c. The Plaintiff replies, that the said Sir Henry Bowyer before

Hob. 71.

Moor 872.

2 Rol. 422. 3.

before this Feoffment by Indenture, 2. May, 4 Jac. covenanted to stand seised of that Mannor to the use of himself in Tail, and for default of such Issue, to the use of the said *Feme* for her life, and after to the use of Sir Thomas Henley in Tail, and after to his right Heirs; And that he afterwards upon the 22. May, 4 Jac. made the Feoffment mentioned in the Bar, and died without Issue; and afterwards she entred, claiming, that Estate by the Indenture, and was remitted, &c. The Tenant rejoyns, that the said *Feme* after the death of her Husband entred, claiming her Estate for life without impeachment of waste by the said Feoffment, and demanded Judgment, If against her claim she may be remitted; Et hoc, &c. Whereupon it was demurred, and adjudged for the Demandant; And Error being brought, and the Error assigned in point of Law, wherein two questions were moved; First, if a *Feme* Covert hath an Estate, limited to her by her Husband for life, remainder to a stranger in Tail, and afterwards the Husband alters this Estate, and limits to the *Feme* another Estate, whether the *Feme* hath election of which Estates she will have, and waive the Remitter, and prejudice him in remainder; or if for the benefit of him in Remainder, she shall be remitted volens nolens, notwithstanding her claim, to take by the second Estate limited, &c. Secondly, whether the Rejoinder be good without traversing the Entail, claimed in the first Estate, alledged in the Replication, or if the Demandant ought to have taken Traversers, because that the Tenant in the Bar pleads an Entry, claiming that Estate by the Feoffment: And for both points it was adjudged for the Demandant in the Common Bench, that she was remitted for the benefit of him in remainder, and that the Tenant ought to have taken a Traverse to the matter alledged in the Replication; and that for want thereof, the Rejoinder was ill in substance, and not in form only, and that advantage ought to be taken thereof, although it were not shewn for cause: And this Case being oftentimes argued at the Bar; was now this Term argued at the Bench; And Croke, Doderidge, and Houghton held, that she is remitted instantly by her Entry, and the remainder vested in him in the remainder, and the claim cannot alter it, and that volens nolens she is in of her first Estate, and that it is not any Joynture, because it is an Estate for life limited, to begin after an Estate Tail; and although the Estate Tail be spent by her Husbonds death without Issue, so that her Estate begins presently by the death of her Husband, yet forasmuch as it could not be said to be a Joynture at the beginning, whatsoever happens afterwards shall not make it to be a Joynture. But Montague Chief Justice argued strongly against it, that both Estates being limited to her during the Coverture, and of that Estate she should be in; And therefore there is a

Hob. 71:
Moor 873.

Co. 4. 2. b.

R r c

difference

Hob. 71.

difference when she hath an ancient right before the Coverture there if she takes a new Estate during the Coverture, the Law peradventure will judge her in her remitter, especially it being for the benefit of him in the remainder; But when she takes two several Estates during the Coverture, she is now to have her election which of them she will have, and her claim shall determine her election. Vide 41 Ed. 3. 17. Dy. 351. 17 H. 4. 1. 12 H. 7. in 20. But for the last point they all agreed, that the Tenant ought to have taken Traverse to the claim alledged, and the not taking Traverse made the plea vicious in substance; Wherefore the Judgment was affirmed.

Payn *versus* Porter in the Exchequer-Chamber.

Ante 8.

Ante 197.
Hob. 267.

(10)

ERror of a Judgment in an Action upon the Case, for that the Plaintiff falsd & malitiosd, imposed upon him crimen feloniam, supposing that he had robbed him; Et falsd & malitiosd exhibited against him a Bill of Endiament, supposing that such a day and year he robbed him; And exhibited it to the Grand Jury in the County of Nottingham, and affirmed the matter in the Bill to be true, ubi revera it was false; And that the Jury found an Ignoramus thereupon, whereby he was inforced to great costs and charges, for the defence of his good name and fame: The Defendant justifies, and found against him, and Judgment for the Plaintiff in the Kings Bench without exception; And now a Writ of Error was brought, and assigned for Error, that this exhibiting a Bill of Endiament is no cause of Action: But all the Justices of the Common Bench, and Barons of the Exchequer agreed, that the Action lies; For although the exhibiting of a Bill upon true and just presumptions, be excusable, and no Action lies: yet when it is alledged, that he falsd & malitiosd without any such cause had accused him of Felony, and exhibited this Bill falsd & malitiosd: That is a great cause of slander and grievance, and just ground of Action for the Plaintiff: And the Defendant having made his justification, and all his causes of justification found to be false, it is good reason that the Action should lie; wherefore the Judgment was affirmed.

Dewell *versus* Sanders.

(11)
2 Rol. 138. 9,
265.

TRespass, upon demurrer: The case was such, The Plaintiff being a freeholder within the Manor of Ilkeworth (whereof the Earl of Northumberland was Lord, and had a Let) erected a new Dove-coat thereon, and stored it with Pigeons, and suffered them to fly out and in, which was presented in the Leet as a common nuisance,

nusance, and an amercement of 40 s. assessed and assented for his offence, and a pain of ten pound imposed that he should stop it up before such a day; and he did not stop it up according to the said pain: Whereupon it was presented at the next Court, and the pain imposed, and assented to 12 l. and for non-payment a distress taken; and he entered into Bond for the payment of the said 12 l. and brought Trespas for the taking of his Cattel, and detaining them until he had entered Bond for the payment of the said 12 l. And the Defendant disclosing all this matter by way of Plea, the Plaintiff thereupon demurred; And after divers Arguments at the Bar, it was argued at the Bench by Montague, Crooke, Doderidge, and Houghton, and they all agreed, that the Plea was ill in substance as well as in form; For they all held, that the erecting a Dove-coat by a Freeholder who is not Lord of the Mannor, nor Owner of the Rectory, and replev-
 Ante 381.
 Co. 5. 104. b.
 2 Rol. 138. 9.
 Moor 233.
 nishing it with Doves, is not any Nusance inquirable or punishable in a Leet, 4 H. 6. 10. 27 Aff. Pl. 6. 9 H. 4. 4. For nothing is inquirable there, and punishable, but that which is a common Nusance to all people: But this erecting a Dove-house cannot be a Nusance but to those only whose Corn they eat, and not to all persons; and therefore it is no common Nusance inquirable there: Also, if it were a common Nusance, the Lord of the Mannor, nor the Parson could not erect a Dove-house more than any other Freeholder, for none can prescribe to make a common
 2 Rol. 265.
 Nusance; For it cannot have a lawful beginning by licence, or otherwise, being an offence against the Common Law; as it was adjudged betwixt Fuller and Sanders, Ant. pag. 446. For a common Nusance is to the prejudice of all people, and it is a continuing offence, and cannot be dispensed with: And therefore they held, the opinion reported Co. lib. 5. 104. b. betwixt Boulston and Hardy in this point, to be no Law, and no direct resolution
 Ante 446.
 in point of Judgment. Also the principal Case proves the contrary; for if it were a Nusance, every one who hath a particular grief might have an Action to punish it; as Co. lib. 5. fol. 73. Williams Case: But this cannot be said to be a Nusance which the Law protects and favours, and for the maintenance whereof Statutes are provided; For it appears that a Dove-coat is dem-
 mandable in a Praeipe next in regard to an house, and Dower shall be thereof, as 45 Ed. 3. 22. & 1 Hen. 5. 1. And an Account lies de columbaria, as 10 Hen. 7. 6. and therefore the Common Law doth not regard it as a Nusance; And the Statute-Laws are divers which make provision against those who take or kill them, or shoot near a Dove-house. And for that purpose also see the Statute of 18 Ed. 2. Title Leet, that the destruction of Doves is inquirable in Leets, 2 Ed. 4. cap. 14. that none shall shoot at any Dove-coat, 8 Eliz. cap. 15. which appoints costs for the taking of Crows, provided that they take not any Doves, 4 Jac. cap. 27. that none shall shoot within a hundred paces of any Dove-house:

- Wherefore they all agreed, that this was not any offence inquirable nor punishable in a Leet. But Montague said, if those who have not any Lands at all, should erect Dove-houses, and increase multitude of Pigeons, to the grievance of the Country, it may be inquired of before the Justices of Assise, who have the like Authority, as to such things, as the Justices in Oyer had, to redress them upon the peoples complaint : but not every Lord within his Leet ; For the Leet is to redress Nuisances within the Precinct thereof, and not to extend further ; And the Erecting of a Dove-house is not in it self a Nuisance : But the storing it with Pigeons, and suffering them to fly abroad into the Country, which is out of the Leet : Wherefore for these reasons it was adjudged for the Plaintiff. *Note*, That in the Argument of this Case, Justice Doderidge said, that if Pigeons come upon my Land, I may kill them, and the Owner hath not any remedy ; But the owner of the Land is to take heed, that he takes them not by any means prohibited by the Statutes ; *Ad quod Croke and Houghton* accord. But Montague held the contrary, and that the party hath *jus proprietatis* in them ; for they be as domestiques, and have *animum revertendi*, and ought not to be killed ; and for the killing of them an Action lies : But the other opinion is the best. Doderidge also said, that the Avowry was ill ; For as they have pleaded, they have not made it inquirable within the Leet ; for they ought to inquire of publick Nuisances made within the Precinct of their Leet, and not of Nuisances made in the County out of their Jurisdiction. But in this Case they say, that he erected a Dove-coat within the Leet, *Et quod columbæ volabant & revolabant*, and consumed the Corn, *ad nocumentum totius patrie* ; but they do not shew, that they consumed any Corn within the Leet. *Note* also, that where it was said in the end of the last Argument, that the erecting of a Dove-coat was a Liberty Signioral, and not Royal, *viz.* that the Lord of a Mannor may license a Freeholder to erect a Dove-coat ; Montague Chief Justice (who before said so) did now deny it, and said, that if it were a Nuisance, neither the King, nor the Lord of the Mannor can give any liberty to erect a common Nuisance ; And therefore 27 *Ed.* 3. 6. license to make a Nuisance is void ; and 22 *H.* 6. if a man will plead a pardon for a Nuisance, it is void, as for the continuance thereof.
- 2 Rol. 139. 1 Cr. 388. Hob. 129. 2 Rol. 139. 1 Cr. 185.

Powle *versus* Hagger.

- (12) Error of a Judgment in the Common Bench, Pasch. 13 Jac. Rot. 582. in an Assumpsit ; Where the Defendant assumed, in consideration of divers sums paid unto him, that if Cooper affirmed at his return beyond Sea, that he received of the Plaintiff 20 l. that the Defendant would pay the 20 l. And alledged in fact, that Cooper returned from beyond Sea, and on such a day, year, and place, affirmed that he received of the Plaintiff 20 l. And that the Defendant licet requisitus, such a day, year,

year, and place, had not paid. The Defendant pleaded Non assumpsit, and found against him, and adjudged for the Plaintiff, and the Error assigned, For that it is not shewn before whom he affirmed, nor that the Defendant had notice given unto him of this affirmation; For without notice given him, he could not take consuance thereof, nor is he bound to pay it: Sed non allocatur; For the Defendant is to take notice of this affirmation as well as the Plaintiff: For the Plaintiff is not bound to give him notice thereof; For the act being to be done by a stranger, and not by the Plaintiff, the consuance thereof lies as well in the notice of the Defendant, as in the Plaintiffs; and therefore the Plaintiff needs not to give him any notice: Whereupon the Judgment was affirmed.

Ante 150.432^b
Hob. 86.

Walter *versus* Mansell. —

ERROR of a Judgment in Newbury: The Error assigned; Because that in Assumpsit there, the Defendant pleaded Non assumpsit, yet the Ven. fac. was de vicineto de Newbury, where it ought to have been de Newbury; for they have not any jurisdiction out of Newbury: And for this point was vouched 8 H. 5. 10. and a Case betwixt Loggins and Ferrer: But upon view of divers Presidents, that the Ven. fac. hath been held good both ways, the Court was of opinion, although the Corporation do not extend their jurisdiction out of the Mill, yet the Ven. fac. being awarded de vicineto de Newbury, those of the Town may well be returned: And accordingly Judgment was affirmed.

(13)
2 Rol. 623.

Ante 308.399ⁱ
Post. 505.

Johnson *versus* Underwood.

ERROR of a Judgment in Leicester in Assumpsit: The Error assigned was, Because in the stile of the Court it doth not appear by what authority the Court was held, viz. whether by custom, or by vertue of Letters Patents from the King: And although it was alledged, that it needed not, because there being an Action commenced and prosecuted there, they well may take consuance of their own jurisdiction, without being inserted in the stile of the Court: And here in the Certificate it needs not to be shewn, because the Writ suppoeth it to be there prosecuted betwixt the parties; secundum consuetudinem Villæ prædictæ; and so the Court takes consuance by what authority the Court was held: And the Record being removed, shall be held to be according to their authority: Yet the Court held, that the Jurisdiction ought to be shewn; But they would advise. Vide 13 Ed.4.8. Dy.262.

(14)

Ante 184.
Post. 532.

Whittingham *versus* Hill.(15)
1 Roll. 729.Dr. & St. 113. a.
Co. Lit. 172. a.

1 Cr. 179.

St. 5 El. cap. 4.

ERror of a Judgment in Shrewsbury: Where in an Assumpsit to pay such a sum for Wares sold, the Defendant pleaded, that he was within age at the time of the wares sold. The Plaintiff protestando that, &c. he was not within age pro placito dicit; that he bought them pro necessario victu & apparatu, & ad manutentionem familiæ suæ. The Defendant rejoyns that he kept a Percers Shop at Shrewsbury, and bought those wares to sell again: And travserfeth, that he bought them pro necessario victu & apparatu: And it was thereupon demurred; and before Baron Bromley, being Steward there, it was adjudged for the Plaintiff; and Error thereof brought, and the Error assigned in point of Law, That this buying by the Defendant, being a Shop-keeper, although he bought for the maintenance of his trade, shall not bind him: And of that opinion was all the Court here; For an Infant shall not be bound by his bargain for any thing, but for his necessity, viz. diet and apparel, or necessary learning: But his buying to maintain his trade, although he gain thereby his living, shall not bind him; nor his Covenant to bind himself Apprentice, unless it be by special custom: Wherefore the Judgment was reversed. Vide

18 Ed. 4. 2. 10 H. 6. 24. Perkins fol. 6.

Termino

Termino Michaelis,
Anno decimo sexto JACOBI Regis
in Banco Regis.

Sir Walter Rawleighs Case.

Memorandum, *This Term* Sir Walter Rawleigh Knight, (1)
who was attainted of Treason, Term. Mich. primo Jac. Hutt. 21.
at Winchester before Commissioners, and had been a
prisoner in the Tower always afterward, until about
three years last past, that he was permitted to go at large, and had
a Commission for a voyage to Guiana, and after his return was re-
manded to the Tower, The Record of the Attainder being brought
and certified into the Kings Bench; was by Hab. Corp. directed to
the Lieutenant of the Tower, brought unto the Bar, where Yelver-
ton the Kings Attorney shewed how by the Kings favour he had
lived thus long, and had since done Acts, for which injustice he
ought not to be further spared, and the King had given command
to pray Execution; wherefore he now prayed Execution of this
Judgment for the King: And hereupon Sir W. R. being demand-
ed what he could say, why the Court should not proceed and grant
Execution against him, answered, that he could not deny but that
he was attainted of Treason as aforesaid, yet he supposed, having
committed no other Acts since, the King would not cause Execution
upon the former Judgment; And he conceived, that in regard the
King had granted him so large a Commission for his Majesties
and the Realms service, and thereby had given him authority to
execute judicial Law and power over the lives of others, that it
was a dispensation unto him for his former offences, and he ought
not now to be called in question for them: But the Court replied
unto him, that he being attainted of Treason, there could not be
any discharge thereof, but by the Kings express pardon; And no
Treason could be pardoned but by express words mentioning it;
And the King might use the Service of any of his Subjects in what
employment he pleased, and it should not be any dispensation for
former offences: And Yelverton Attorney told him, that he had
since committed offences which were just causes of proceeding against
him, but he being a prisoner attainted and dead in Law, there
could not be any proceedings for these new offences, but to
take execution upon the former Judgment, which he prayed
might be done: Whereupon Montague Chief Justice used some
words of Exhortation to the Prisoner, and then commanded
that Execution should be done according to the first Judg-
ment,

ment, not mentioning any of the offences, or former Judgment; And the Lieutenant of the Tower had the prisoner delivered into his custody, and the Sheriffs of Midd. had a Writ given them in the Hall to receive him, and to do execution; which was done the day after Simon and Jude, in the great Court betwixt the Hall and Saint Peters Church.

Waite *versus* the Hundred of Stoke.

- (2) **A**ction upon the Statute of Winton of Hue and Cry: Upon Not guilty pleaded, and a special verdict given; The question was only, whether one being robbed upon the Sunday morning in time of Divine Service, and making Hue and cry, and the Hundred not producing any of the Robbers, Whether it shall be chargeable by the Statute: And this being twice argued at the Bar on both sides, the Justices delivered their Opinions seriatim, because it was a leading case in this point, and had never before been questioned: And Croke, Doderidge, and Houghton held, that the Hundred was chargeable; And although the robbery was made upon the Sunday, and in time of Divine Service, yet that is no excuse for them; for they are to provide that Robberies be not committed, and if they be, that the Robbers be suppressed: And this Act is made for the peace of the Realm, and in advancement of Justice, and therefore shall be liberally construed; And the pursuing of Felons who attempt to violate the Sabbath, is no offence, but a good work of Charity and Justice, and otherwise would cause Robberies upon the Sunday, and for that they escaped unpursuing; And sometime divers persons are upon necessity forced to travel upon the Sunday, as Physicians, Chirurgions, Midwives, &c. And it is reasonable they should be protected in their journey: And by the Statute of 27 H 6. cap. 5. It is allowed that Fairs may be held upon the four Sundays in Harvest, and so it allows riding upon the Sunday; and then they who ride ought to be protected that day as well as any other: And Justice Croke put the case, if an Insurrection should be upon the Sunday, as it was in London in the Earl of Essex Case, if it be not suppressed immediately, the Officers are finable: So if an Affray be made upon a Sunday in view of the Constable, if he doth not suppress it, it is finable; A multo fortiori, robbery ought to be suppressed; Also the Statute doth not mention any day, nor time of the day, but that every day robbery shall be suppressed. Vide Mackally's Case, lib. 9. fol. 66. b. That an arrest upon the Sunday and other Ministerial Acts are good, but not judicial Acts; for a judicial Writ bearing Teste upon a Sunday, or a Proclamation of a fine upon a Sunday, are ill and erroneous, for they shall be intended as fictions, because it is well known the Court does not sit that day: But

Post. 595.
1 Cr. 485.

Ante 280.
Sals. 58
Ante 85.

29. f. 2. c. 7.
5. Mod. 65
contra

But an original Writ or Patent bearing Teste upon the Sunday, are good enough; For the Chancellor may seal Writs or Patents upon any day: This Statute extends to the day and not to the night, and to robbery upon the High-way, and not committed in Houses, because the Country cannot pursue in the night, nor know what is done in private houses; For which, &c. Montague Chief Justice to the contrary. For the Country is not bound to watch upon the Sunday, and therefore resembled it to the Case in lib. 5 Ed. fol. 27. And because the Law appoints that men should be at Divine Service, they are bound to pursue Robbers, and it is at their peril who travel upon Sundays, if they be robbed: And this Statute is to be taken in equity, that Robbers should be pursued in convenient times, which is not upon the Sunday, no more then that they should be pursued in the night; wherefore he held that it was a good excuse for the Hundred: But notwithstanding his opinion, Judgment was given for the Plaintiff.

Fitzhugh Cranvell *versus* Sanders.

Ejectione firmæ; Upon evidence to a Jury, it was resolved by the Court, and so delivered to the Jury, that if one makes his Will in writing, of Land, and afterwards upon communication saith, That he hath made his Will, but that shall not stand; or, I will alter my Will, &c. These words are not any revocation of the Will, for they be words but in futuro, and a Declaration what he intends do; But if he saith, I do revoke it, and bear witness thereof, he hereby absolutely declares his purpose to revoke it in present, and it is then a revocation: Also Montague said to the Jury, and it was not denied by any other of the Justices, that as one ought to be of good and sane memory at the disposing, so ought he to be of as good and sane memory when he revokes it; And as he ought to make a Will by his own directions, and not by questions, so ought he to revoke it of himself, and not by questions.

(3)

Ante 115.
3 Cr. 306.

Martin Leefer his Case.

Note, that a President was shewn and read in Court, Trin. 2 H. 4. Rot. 2. one Martin Leefer was indicted in the County of Surrey before the Justices of Peace, Because that he feloniously entred the House of J. S. and feloniously stole 18 d. Upon Not guilty pleaded, the Jury found a special Verdict, that the said Martin Leefer and one J. D. and J. N. de cognitione sua communes Lusores haserdatores, Anglice Common Players and Haserdors, cum aleis, Anglice Dice, and that they used to play with false Dice, and couzen the Kings Liege people at play; And that they entred into the

(4)

§§§

House

1 Cr. 235.
3 Cr. 307.

House of the said J. S. and desired him to play with them at Dice, and with false Dice they won of him 12 *d. ob.* And if this be Felony, they prayed the discretion of the Court: And this Endictment and Verdict was removed into the Kings Bench, and thereupon Judgment was entred, That although this was not an offence for which he should lose life or member, yet because it was found that he was a common Cozener of the Kings people, It was ordered, that he should be set upon the Pillory three several days in the *Strand*, and three several days in *Southwark*, where the offence was committed. *Note*, that *Noy* shewed this President to the Court, and presently the Roll was viewed and read: And *Montague* commanded a Copy to be taken thereof, as a good President for the Jurisdiction of the Court, and Government of the Common wealth.

Lawley versus Gattacre, Hill 14 Jac. Rot. 3368. in Com. Banc. & Pasch. 15 Jac. Rot. 747. Salop.

- (5) **E**Rror of a Judgment given in Dower; The Error assigned was, for that the first Declaration was of a demand de tertia parte unius Messuagii ac. terr. ac. Prat. ac. pastur. in Harley; all was with blanks. But the second Declaration after the imparlance was perfect, (viz.) de uno Messuagio, 100 ac. terr. 40 ac. prati, 40 ac. Pastur. cum pertinentiis in Harley. And to this the Defendant pleaded, and tried against him upon *nunques seisse* pleaded, and Judgment given accordingly; And now Error was assigned for this fault in the Declaration, which is the material Declaration; for the other is but a recital of this Record, and it is not helped by the Verdict; And of that opinion was all the Court: Wherefore the Judgment was reversed.

Amc 105.
Post. 537.

William Pemberton versus Shelton, Trin. 16 Jac. Rot. 270.

- (6) **D**Ebt of 33 l. against the Defendant, upon the Statute of 2 Ed. 6. for not setting forth his Tythe: The Plaintiff being Parson of High-Onger in the County of Essex, shews that the Defendant occupied so much of arable Land, and the Corn was worth, the tenth part whereof was and so much of Meadow, and that the Hay was worth 33 s. and 8 d. per annum, so the entire value was worth 11 l. and the treble value 33. for which he brought the Action: The Defendant pleaded non debet, and found against him for 20 s. And it was now alledged in arrest of Judgment, that the Declaration was not good, for the third part of 33 l. and 8 d. is 11 l. 2 s. and not 11 l. only, and the treble value of 11 l. 8 d. is 33 l. 2 s. and not 33 l. only. And he ought not to demand less than the due debt, unless he shew satisfaction; as in 40 Ed. 3. 13. and 9 Ed. 4. 51. Debt upon a Specialty or Annuity cannot be demanded less than is in the Specialty, but he

he ought to acknowledge satisfaction of the residue : Sed non allocatur ; For all the Court held, it was well enough ; For there is difference, where it is grounded upon a Specialty, or upon a Contract, which is a sum certain, or upon a Statute, which gives a certain sum for the penalty ; For no demand can be of a lesser sum, but he must shew how he was satisfied of the residue ; and he may not vary from the Specialty : But when the demand is of no sum certain, nor what he shall recover in certainty, but only so much as shall be given by the Jury ; although he varies from the first valuation, it is not material ; For he shall not recover according to his demand in the Declaration, but according to the Verdict : Wherefore it was adjudged for the Plaintiff.

1 Cr. 436.
Post. 530. 569;
Yelv. 5.
Hob. 279.
Ante 247.

1 Cr. 331.

Hunt *versus* Jones, Trin. 16 Jac. Rot. 901.

Error of a Judgment in Bristol, in an Action for words : The Error assigned was, That the words were not actionable : And there the Plaintiff shewed, that she being a widow of a good name and fame, and having used for divers years the trade of a Baker, whereby she got gains for the maintaining of her self and her Family, and being a widow, was desired in marriage by many honest men ; The Defendant knowing the Premises, spake these scandalous words of her, in speaking to the Plaintiff in the presence of divers others, Away you pick-pocket, thou (innuendo the Plaintiff) art a scurvy pocky whore ; whereby she is hurt in her fame, and lost her marriage, and divers forbear to buy bread of her. After Not guilty pleaded, and found for the Plaintiff, and Judgment for her, it was now assigned for Error, that an Action lies not for these words ; For it is not shewn, that she was in communication with any for marriage, and thereby had lost her marriage : Also she doth not shew, that she was a common Baker, and so had any loss by these words ; but generally, that she baked : Also the words are adjectively spoken, and not so strong as if they had been absolute words : And they are words which do not shew any intention that he spake of the French Por, which ought to be shewn by some particular circumstances from the words. And of this opinion was all the Court : Wherefore the Judgment was reversed.

(7)

Ante 323;

Ante 8r.
Post. 514.

Thomson *versus* Field.

Debt upon an Obligation, conditioned, to perform the Covenants in an Indenture, whereby he lets Land, rending the rent of 10 l. per annum, or within six days after those Feasts : The Defendant pleaded performance of Covenants ; The Plaintiff assigns breach, That he, such a day, being the sixth day after the Feast, before Sun-set demanded 5 l. for rent then due ; and

(8)

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neither

neither the Defendant, nor any for him were there ready to pay it ; For which, &c. And hereupon the Defendant demurred : And it was moved by Serjeant Chibborn, that the Declaration was not good, because he doth not shew the certain time when he came before Sun-set, and how long he remained after Sun-set to demand the same ; so as it might appear to the Court that there was time sufficient for telling of it out : Sed non allocatur ; For it being so small a sum, it requires not much time for the telling thereof : And when he came before Sun-set, and stayed there after, and none came to pay it, it is well enough alledged, although he doth not say what time he came before Sun-set, nor how long time in certain he remained there to demand it. Secondly, It was objected, that this demand is not good, because he demanded it as a Rent then due ; whereas he ought to demand it as a Rent due at the last Feast : Sed non allocatur ; For the Rent being reservable, and payable at the said Feast, or within six days after, it is not due to be demanded until the sixth day ; but it may be paid, if the Tenant will, before : wherefore the demand was well enough. Thirdly, It was also resolved, that the condition being for the performance of Covenants, Payments, and Agréments, the non-payment of the Rent upon demand on the last day was a breach of the Bond : wherefore it was adjudged for the Plaintiff.

Age 310.

1 Cr. 207.
Ante 439.

Batesby *versus* Brooksbeck.

(9)

Assumpsit : And declares, whereas he bargained with Simon Batesby to sell and deliver unto him 150 stone of wooll, for 114 l. to be paid at a certain day to come ; That the Defendant in consideration the Plaintiff would deliver the said wooll to the said S. B. became fidejussor for the said S. B. Assumendo, & adtunc & ibidem promittendo to the Plaintiff, to pay the said money to the said Plaintiff : and alledgeth in fact, that he trusting to the Defendants promise, delivered the said wooll to S. B. and the 114 l. not being paid, he thereupon brought this action. Upon Non Assumpsit pleaded, and found for the Plaintiff, it was moved in arrest of Judgment, that the Declaration was not good ; For he grounds his Declaration upon the Assumpsit, and there is not any Assumpsit in the case, but that he became fidejussor : And then it ought to have been shewn, that the Principal had not paid it, being demanded ; and so to have alledged a default in him, and afterwards a demand of the surety : and this not being alledged, there is no default alledged, and therefore the action lies not against him. And of that opinion was all the Court, absente Montague : Wherefore it was adjudged for the Defendant. Vide 40 Ed. 3. 5. 39 Ed. 3. 12. Dyer 370.

Moore *versus* Bullock.

Prohibition; The surmise was, that the Abbot of Beauchiese in the County of Derby, was seised in fee of the Rectory of Norton, which was appropriated to the said Abbey, time whereof, &c. was seised in fee of a Close called the Medow-Close in Greenston, in the Parish of Norton; and held the said Close, and took the profits thereof in right of all Tythes of Hay within the said Hamlet of Greenston: The Defendant pleaded, that the Abbot was seised in fee of that Close, as parcel of such a Farm, and travaileth, that he had it, and took the profits thereof in lieu of the Tythes of Hay in the said Hamlet: And Issue being joyned thereupon, it was found for the Plaintiff; and was now moved in arrest of Judgment, that the surmise was not good; For he shewing that he was seised in fee, that is, as parcel of his Glebe, it cannot be in recompence of the Tythes: But it ought to have been shewn, that it was given in ancient time in recompence of the Tythes; or shewn, that he and his Predecessors time whereof, &c. have had the occupation of that Close, and the profits thereof, in lieu of Tythes; and not to say that he was seised, which shall be intended as parcel of the Glebe: Sed non allocatur; For it is a better form to say, that he was seised in fee; for it is so ancient that it cannot be shewn when, or by whom it was given: But having had it always in lieu of Tythes, it is good enough, and shall be intended to be given before time whereof, &c. in recompence of the Tythes: And that in regard of that Land the discharge of those Tythes had its beginning: Wherefore it was adjudged for the Plaintiff. Vide 8 Ed. 4. 14. Co. 2. Rep. fol. 45. Pigot and Herns Case; and a President was cited, Hill. 42 Eliz. Awsten and Pigot, where such a Prescription was held to be good.

(10)

1 Rol. 649.

1 Saund. 142.

3 Cr. 736.

Guy *versus* Livezey.

Trespas of Assault and Battery: For that the Defendant did assault, beat, and wound the Plaintiff; Nec non for that he assaulted and beat the wife of the Plaintiff, per quod consortium uxoris suae for thre days amissit: The Defendant pleaded Not guilty, and it was found against him in both, and damages assessed to 80 l. (it being in truth a great battery to the Baron) and the damages given, for that the Plaintiffs wife went with the Defendant, and lived with him in suspicious manner: And it was now moved in arrest of Judgment, that the Baron ought not to joyn the battery of his Feme with the battery which was done unto himself: And he cannot have an Action for the battery of his Feme, but ought to joyn his Feme with him in the Action; For the damage done to the Feme, she ought to have (if she survive

(11)

2 Rol. 556.

1 Cr. 90.
Post. 538.

survive her Husband; and so the Defendant may be twice punished for one and the same battery, if the Plaintiff here should recover; For this recovery of the *Barons* shall not bar her of bringing her Action, if she survive him: Wherefore if the *Baron* will bring the Action, he ought to have joyned his *Feme* with him. But all the Court held, that the Action was well brought; For the Action is not brought in respect of the harm done to the *Feme*, but it is brought for the particular loss of the husbands, for that he lost the company of his wife, which is only a damage and loss to himself, for which he shall have this Action, as the Master shall have for the loss of his Servants service: And a President was shewn in 28 Eliz. Rot. in this Court, where one Cholmley brought an Action for the battery of his *Feme*, per quod negotia sua infecta remanserunt; and had Judgment to recover. And another President was cited to be in the Exchequer in Doylies Case, that such an Action was adjudged good: Wherefore it was adjudged here, that the Plaintiff should recover, 9 Ed. 4. 51. 46 Ed. 3. 3. 22 Ed. 4. 44. 3 Ed. 3. brevium 737. 20 Ed. 3. brevium 251. 22 Aff.

Harris Case.

(12)

Ante 67.

Ante 457.

1 Cr. 315.

ENDICTMENT of Nusance against Harris and others, for erecting a Nusance upon the River at Barnstable: The Defendant pleaded Not guilty, and found against him; and the Record being here against them by Certiorari, it was viewed, and there was not any Issue joyned; For where the entry upon the Issue, Not guilty pleaded, should have been by the Clerk of Assise, who ought to have joyned the Issue, it was omitted; so the Verdict was without Issue: which being moved in Court, they ordered that it should be amended; For it is but matter of course, and by intentment was then omitted in the Entry by default of the Clerk: And although it were divers years since, and in the time of another Clerk of Assise, who was now removed, yet it was ordered, that the Clerk of Assise who then was should mend it; which was done, and it was amended: And these words, Et Richardus Warer (who was then Clerk of the Assise) qui pro Domino Rege sequitur similiter, &c. were by order of Court interlined; For it was said, that if such faults should not be amended, many of the Trials upon Endictments (and peradventure in case of felony) would be overthrow.

Bourn versus Carrington.

(13)
1 Roll. 494.

ERROR of a Judgment in Derby in Debt against the Heir, upon an Obligation by his Father: The Defendant pleaded, *Riens per descent*: The Plaintiff replies *Affets*, but doth not shew any place: And it was found for the Plaintiff; and now Error assigned,

assigned, because he did not shew in his Replication any place where the *Assets* should be; and so there is no place from whence the Venue should come. And although it were alledged, that this being in a Corporate Mill, which hath not any jurisdiction to try any matters out thereof (and therefore may be well intended to be in Derby, where the Action was brought) yet all the Court held it to be erroneous; For intendment shall not help it, and the Replication is ill; and it is all one whether the Action is brought in a Corporation, or in any other Court: For in both the Plaintiff ought to shew the place of *Assets*; and because he did not, it was ill, and the Judgment was reversed: And in the same Term, a Writ of Error was brought of a Judgment in Lichfield, betwixt Clerk and Broughton, where in Debt against the Heir, upon an Obligation of his Father, the Defendant pleaded *Riens per descent*: The Plaintiff replies, that he had *Assets* by descent, but they did not find any place where: And the Plaintiff had Judgment, and this Judgment was affirmed, although it were objected, that this being a private jurisdiction, they had no authority to enquire of any thing out thereof; and that this differs from the Case of Actions brought in the Kings Courts, which have a general jurisdiction: Sed non allocatur; For this enquiry is good enough; as an enquiry may be of *Assets* in Ireland: Ante 59.
Wherefore the Judgment was affirmed. Vide Co. lib. 6. fol. 46. Dowdales Case.

Leneret *versus* Rivet, Trin. 16 Jac. Rot.

Assumpsit: Whereas one Thomas Ogle had acknowledged himself to be indebted to the Plaintiff in 10 l. for divers Trespasses done unto him; which 10 l. the Plaintiff at the Defendants request was contented to accept of: The Defendant in consideration that the Plaintiff, at the Defendants request, would acquit and discharge the said Thomas Ogle of the said debt, and permit him to carry out of the Plaintiffs house certain Goods of the said Thomas Ogles, which were then there, assumed and promised the Plaintiff to pay unto him the said 10 l. at such a day; and alledges in fact, that he acquitted and discharged the said Thomas Ogle of the said 10 l. debt, and suffered him to carry away his said Goods out of his house; and that the Defendant had not paid the said 10 l. to the Plaintiff according to his promise. The Defendant pleaded Non assumpsit, and found against him: And it was now moved in arrest of Judgment, that the Declaration was not good, because he doth not shew how he acquitted the said Thomas Ogle; For it cannot be without Oed, which ought to be particularly shewn: And although that the consideration, to suffer him to carry out of the Plaintiffs house the said Goods, had been a sufficient consideration (14)
Ante 165.
3 Cr. 759.

3 Cr. 79.
Ante 127.

deration, and was well alledged, if it had been by it self; yet when it is joyned with another consideration, which is good, if it had been alledged to have been performed; It not being well alledged to have been performed, makes the whole Declaration to be ill; And of that opinion was the Court: Wherefore it was adjudged for the Defendant.

Blunden versus Eustace.

(15)

Action upon the Case: Whereas he was a Surveyor and Measurer of Lands, and gained his living by surveying and measuring of Land, The Defendant having communication with him about measuring of Land, spake of him these words, Thou art a cozening and a shifting Knave, and a cheating Knave, After Verdict, upon Not guilty pleaded, it was moved, that these words are not Actionable, for the words be too general: But Calthrope for the Plaintiff moved, that he might have Judgment, inasmuch as they touch him in his Profession and means of getting his living; And the Art of surveying and measuring of Land is an Art whereof the Law takes consulaunce: And Montague Chief Justice said, Although generally to say that one is a cozenor, an Action lies not; yet for such a particular person, this touching him in his means of living, the Action well lies: But the other Justices doubted thereof; wherefore they would advise. Afterwards in Hilary Term being moved again, all the Court agreed, that in regard a Surveyor is an Officer of skill, and there is such an Officer for the King, who is mentioned in Acts of Parliament by that name, these words touching him in his profession thereof, and taking from him his means of gaining his living, the Action well lay; And it was adjudged for the Plaintiff.

1 Cr. 563.
Hob. 76.

Beckwith versus Nott, Mich. 15 Jac. Rot. 510.

(16)

Error of a Judgment in an Action upon the Case, upon an Assumpsit made at Southwark: The first Error assigned, That the Declaration was not good; for he declares, Whereas the Defendant was indebted unto him in four pounds, he promised at Southwark, upon such a consideration, that he would pay it him by five shillings the month: And alledgeth in fact, that he had not paid the said four pounds, nor any parcel thereof, according to his promise: And the Action was brought within four months after the promise made, so before all the money was due; And declares ad damnum six pounds: And upon Non assumpsit pleaded, and found for the Plaintiff, and damages assessed to four pounds, and Judgment accordingly, it was alledged to be erroneous; For he ought to have stayed the bringing of his Action until all had

had been due, or to have demanded the sum which was due for the four months only, and not the entire debt; as in Debt upon a Bill or Recognizance, payable at two days, he may not bring his Action until the whole sum is due upon the Bill. But it was thereto answered, that this is not like to the Case of a Bill of debt which is grounded upon the speciality, and cannot be demanded until the entire sum be due: But here it is grounded upon the promise, which is broken by every non-payment according to the promise; and he doth not demand any sum certain, but only Damages, and it is at the discretion of the Jury, if they will find the entire sum in Damages, only for so much as is due: But when they give the entire Damages, as here Doderidge said that it is with an averment, that it is given for the entire sum; and it shall be a good bar in a new Action upon the Case upon that promise: And of that opinion were all the Justices, besides Houghton, who doubted thereof, and held that the Declaration was not good, because he did not declare in certain, that the promise was not performed by the non-payment at such days, and did not demand Damages for it: and not to say that the four pound is not paid, nor any parcel thereof; for the 4 l. is not yet due. Vid. Co. lib. 4. fol. 94. Dy. 112. Another Error was assigned, because the Ven. fac. was awarded de vicineto de Southwark, where it ought to be de Southwark, 9 H. 5. 10. Sed non allocatur; wherefore the Judgment was affirmed. Nota ex hoc, That where a man brings such an Action for breach of an Assumpsit upon the first day it is best to count of damages for the entire debt, for he cannot have a new Action.

Co. Lit. 292. b

Post. 683.
1 Cr. 241.

Ant. 493;

1 Cr. 241.

Bennus versus Guyldey, Trin. 16 Jac. Rot. 1389.

Action upon the Case; whereas the Defendant recovered against him 7 l. 10 s. for costs and Damages, and upon that Judgment the Plaintiff paid unto him 7 l. And the Defendant made unto him a Release of that Judgment, and by his deed covenanted that he would withdraw all process of Execution for that debt; That the Defendant intending unjustly to vex him, against this Release, and against his promise in the said writing, the 20 June 15 Jac. sued a Capias ad satisfaciendum against the Plaintiff for this Debt, returnable 13 Trinitat. following, which he delivered to the Sheriff to execute, who by force thereof afterward (viz.) the 20 July 15 Jac. arrested and detained him in Prison, until he paid the 7 l. 10 s. to his damage, &c. The Defendant demanded Oyer of the deed, which was entered in hæc verba; wherein was the clause of Release and Covenant to withdraw the Process of Execution: And also another Covenant which was not mentioned, (viz.) to acknowledge satisfaction upon the Plaintiffs Cost, upon request: The De-

(17)
1 Rol. 517.

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fendant

Cr. 343.
Post. 598.

Ant. 140.

Defendant pleaded hereto, that the Sheriff did not arrest him by his appointment: Upon which Plea being vicious, the Plaintiff demurred; and upon argument the Defendant did not maintain his Plea, but took Exceptions to the Declaration. First, that he ought not to sue this Action in nature of a deceit, (as it was pleaded) for suing forth Execution against his own Release; but he ought to have relieved himself by an Audita querela. Secondly, that he ought to have had an Action upon the Case, upon the promise, to withdraw Process of Execution; and if he had extended, yet an Assumpsit lies not thereupon, because it is by Deed, and so he ought to have an Action of Covenant, and not an Assumpsit; and of that opinion was the whole Court as to that point. Thirdly, it was objected, that it appears by the Plaintiffs own shewing, that he was not grieved by this Process of Execution; for it is shewn that the Sheriff arrested him upon the 20 July, which was a long time after the return of the Writ, so it was done without Warrant, and is false Imprisonment in the Sheriff, who took him by colour of that Process; and for that cause principally this Declaration was held by all the Court to be ill. Fourthly, it was objected, that the Declaration was not good, because he declares upon a Deed, and recites but parcel, whereas he ought to shew the whole Deed: Sed non allocatur; for he mentions as much as serves for his purpose in this Action, and the residue shewn doth not alter it: Wherefore for the first and third exception it was adjudged for the Defendant.

Clerks Case.

- (18) **C**lerk of Hertford being expelled from being a Burgess there, procured a Writ to the Mayor and Burgesses to restore him, or signify the cause; who returned, that he being Churchwarden, presented one of the Burgesses maliciously without cause for being absent from the perambulation; for which being rebuked by the Mayor he said contemptuously, I care not for Mr. Mayor nor any of the Burgesses; and for this cause he was expelled: And it was held to be no cause of Expulsion; wherefore there was another Writ of Restitution awarded.

Co. 11. 98. a.

Michel *versus* Sir John Croft and others, Trin.

11 Jac. Rot. 119.

(19)

Scirefac. upon a Judgment in Debt against Thomas Rivet for 200 l. against his Certenants; The Sheriff returned, that he warned Sir John Croft and three other Certenants; the three made default; Sir John Croft pleaded, that one Thomas Rivet was Certenant of 20 acres in such a Vill, which are the Lands of the said Thomas Rivet, against whom the Recovery was at the time of the Judgment; and demand Judgment, if

if he shall be put to answer, until the said Thomas Rivet be warned; and thereupon the Plaintiff demurred: And after Argument at the Bar, it was adjudged for the Defendant, that the Plea was good; for as Houghton said, there is difference betwixt a Scire fac. to have Execution upon a Judgment in Debt, and to have Execution upon a Judgment in a real Action; for in the last, this is not any Plea, for every Tenant shall answer for that which he hath, and the one may lose, and the other not; but in a Scire fac. to have Execution of a Debt, because every one ought to be contributory for his part, the one shall not answer as long as he can shew that another is contributory with him: And although the Sheriff returned, that such are Certenants, yet that shall not conclude the Defendant, but that he may say, that another is Certenant of parcel, who is not warned; and a Purchaser cannot have an Audita querela, until he be grieved by the Execution sued against him, as 17 Ass. and 17 Ed. 3. 29. And being warned, if he do not plead, that another is Certenant, who ought also to be charged, he never afterward shall have an Audita querela: And that one may have an averment against a Sheriffs return, appears, 2 Eliz. Dy. 173. 41 Ed. 3. 36. 11 Ed. 3. brevium 286. This Plea pleaded was allowed to be good; but that the Writ should not abate, and that the Defendant should not answer until the other was warned. Vid. 12 Ed. 3. Execut. 77. Wherefore it was adjudged for the Defendant.

1 Cr. 518.

Co. 3. 14. a.

Co. 3. 13. b.

1 Cr. 518.

Roberts *versus* Trenayne, Trin. 14 Jac. Rot. 850. Cornub.

T Respass de clauso fracto in Northall: Upon Not guilty pleaded a special Verdict was found, that Cyprian Cory was seised in Fee of the Land in question; and that it was agreed that one Mary Adington should lend unto him 150 l. and for the security of the repayment thereof, Cyprian Cory leased unto the said M. this Close for sixty years, to commence at the end of two years, upon condition that if he paid the 150 l. at the end of two years, that the Lease should be void: and it was then further agreed betwixt them, that the said Cyprian Cory, for the deferring and giving day of payment of the said 150 l. for two years, should pay unto the said Mary for interest yearly 22 l. 10 s. quarterly, if the said Mary should live so long; That in performance of this agreement, she lent the said Cyprian Cory 150 l. and he made the said Lease for sixty years, and granted by fine to the said Mary Adington an annual Rent of 22 l. 10 s. to be paid quarterly, if she lived so long, and afterwards conveyed the Inheritance to the Plaintiff; and that the said 150 l. was not paid; and that the said Mary took to Husband Trenayne, who entred for Non-payment; Et si super totam, &c. The first question was, whether it were an usurious contract within the Statute, because it

(20)

was a meer casual Bargain; for if the dye before any day of payment of the Rent, the Rent was gone, and yet he should retain the 150 l. for two years, and pay nothing for it; and it was resolved, that it was an usurious bargain, for by intentment she might live above two years, and it is an apparent possibility that she should receive that consideration whereby she is within the Statute. Vid. Co. 5. fol. 70. Cleytons Case. Secondly, it was moved, whether this Lease, being taken for the Payment of the principal money, and not for the payment of any part of the usury, be within the Statute, to make the bargain void; and it was resolved, that it is, because it is for the security of money lent upon Interest, and for the securing of that which the Statute intends he should lose; For otherwise it would be an Evasion out of the Statute, that he would provide for the securing of the Payment of the Principal, whatsoever usurious bargain was made; which the Law will not permit. Thirdly, it was objected, That this Verdict found, that there was an agreement between them in the same manner, prout, &c. But it doth not find that it was corrupte agreement, which ought to be precisely found, to draw him to be an Offender within the Statute: And therefore in an Information, if it be not alledged, that corrupte agreement fuit, it is not good; so upon the Statute of 5 Eliz. of perjury, if it be not alledged that he voluntarie & corrupte commisit perjuriam, it is not good: Sed non allocatur; for there is a difference betwixt an Information, which ought to be precisely alledged, and a special Verdict wherein all the circumstances are found, which being apparent to the Court to be usurious, and cannot by Intendment have any other Construcion, it sufficeth; and here it is apparent, that the money was lent for Interest, and is more than the Statute permits; wherefore being Usury apparent, the Court shall judge it accordingly: And one Higgins and Mervins Case was cited to be adjudged, that if the corrupt agreement be not expressed in the Verdict, and the matter is apparent to the Court to be Usury, there the Jury needs not to shew, that it was corruptly, for res ipsa loquitur; otherwise it is, if it be but implied; wherefore it was adjudged for the Plaintiff. Note, that Justice Doderidge took these differences in cases of casual usury. First, if I lend 100 l. to have 120 l. at the years end upon a casualty; if the casualty goes to the interest only, and not to the Principal, it is usury: For the party is sure to have the Principal again, come what will come; but if the Interest and Principal are both in hazard, it is not then usury: And it was therefore adjudged in the Common Bench in *Dartmouths Case*, where one went to the *New-found Land*, and another lent unto him 100 l. for a year to victual his Ship; and if he returned with the Ship, he would have so many 1000 of Fish; and expresses at what rate, which exceeded the Interest which the Statute allows; and

if

if he did not return, that then he would lose his Principal: It was adjudged to be no usury. Secondly, if I secure both Interest and Principal, if it be at the will of the party who is to pay it, it is no usury; as if I lend to one 100l. for two years, to pay for the loan thereof 30l. and if he pay the Principal at the years end, he shall pay nothing for interest, this is not usury: For the party hath his election, and may pay it at the first years end, and so discharge himself. Co. 5. 69. b

Sheriff *versus* Wrotham, Trin. 15 Jac. Rot. 615.

T Respals, quare clausum fregit apud Ridgwell: Upon Not guilty pleaded, a special Verdict was found, that William Wade being Lessee for 21 years of the Land in question, by his Will devised the benefit of his Lease to Alice his Wife for six years after his death; and further devised, that after the said six years ended; then John my Son if he come home, shall have the benefit of my said Lease, during the residue of the Term; and if John my Son doth not then come home, then William my Son shall possess and have that Lease unto his Benefit, until John my Son do come home: And he devised to his Feme all his Goods, Chattels, and Implements of House, and made her Executrix, and died; Alice enters Clamando virtute legationis: William the Son, during the six years (John being beyond Seas, and not returned) made his Will and devised that Lease to Hester his wife, and made her his Executrix, and died: The six years afterwards expire, John doth not return; Hester takes to Husband the Plaintiff, who enters; Alice takes to Husband the Defendant; and which of these had right, was the question: And after divers arguments at the Bar, it was adjudged for the Plaintiff, That Hester had good right as Legatee, or as Executrix of William the younger Son, although he dyed before the six years expired: And although it were objected, that it was a meer possibility in the second Son, and that he could not have it, unless he survived the six years, and his Brother did not return; so as there were two Contingencies therein, and it was never vested in the Testator; And therefore he could not devise that his Executrix should have it; for she can take nothing unless her Testator had the Interest in him; for she cannot take it as bona Testatoris, when the Testator never had it: Yet all the Court held, when it was first devised for six years, and afterwards for the residue of the Term: It is not a possibility, but the Interest of the Term after six years expired; And although it should be accounted to be a possibility in the Testator, yet for as much as it is such a possibility, that the Term might have vested in him, if he had lived until after the six years expired, the Feme by her Entry having agreed to that Legacie, the

(21)

2 Rol. 916.

2 Rol. 484.

Ant. 461.
Co. 10. 85. b.

1 Rol. 916.

the residue of the term might have vested in him without any other Ceremony; It was held, that that possibility might well go to his Executrix: And the Executrix should have it, because it might have vested in the Testator. Vid. Co. lib. 3. fol. 19. Borastons Case, That a Term certain being limited to one, and after that it shall go to another, is not a contingent Estate, but a meet interest. Vid. Plowd. 519. Weldens Case, and Co. 10. 51. Lampets Case so resolved: And although a Judgment was cited in this Court, Trin. 8. Jac. Rot. 439. betwixt Price and Atmere, that such a possibility of a term shall not go to an Executor or Administrator, they held that it was not Law; but conceived the resolution in Lampets Case to be good Law in this point: And it appears here, that the Defendant hath not any colour of claim; for it is limited unto her but for six years; so she ought not to have it for a longer time; and that John was not to have it, unless he were returned: Wherefore it vested in William; and thereupon adjudged for the Plaintiff.

Havergill *versus* Hare, Hill. 13 Jac. Rot.

(22)
1 Rol. 846. 7.
2 Rol. 48. 9.
799, 800.

Ejectione firmæ of a Lease of William Fisher, of Lands in Plumsted for three years: Upon Not guilty pleaded, a special Verdict was found, That William Parker was seised of that Land in Fee, and the 31 Octob. 8. Jac. by Indenture inrolled within six months, granted a Rent of 20 l. per annum to Isaac Warden, and his Heirs and Assigns, payable at Michaelmas and the Annunciation, with clause of Distress: And by the same Indenture covenanted, for himself, his Heirs or Assigns, upon request by the said Isaac Warden, his Heirs and Assigns, to levy a Fine of the said Lands to Robert Hill and William Pewall, which Fine should be to the uses following, and that they should stand and be seised to the uses, intents and purposes after expressed; That if it shall happen the said yearly Rent of 20 l. to be behind and unpaid, and that not sufficient distress can be found upon the premises, or any replevin, poundbreach, or replevin shall happen to be made, That then, and from thenceforth it shall, and may be lawful for the said Isaac Warden, his Heirs and Assigns, into the said Lands to enter, and to have and enjoy the Rents thereof, until the said Rent of 20 l. with the arrearages thereof, if any be arrear, be fully satisfied unto the said Isaac Warden, his Heirs or Assigns: They find that the said J. W. by Deed indented and inrolled within the six months, 12 Junii Anno 9 Jac. bargained and sold that Rent to William Fisher the Lessor, with all penalties, forfeitures, profits and advantages comprised in the said indenture: That in 19 Octob. 11 Jac. the Rent due at Michaelmas being arrear, was demanded by William Fisher and not paid, nor yet is paid: That in Trin. 12 Jac. William Pewall, at the request of William Fisher, levied a Fine to the uses comprised in the

the said first Indenture; that afterwards 23 Septemb. 13 Jac. William Fisher distrained for this Rent of 10 l. due at Mich. 11 Jac. and impounded the distress, and the Defendant sued a Replevin, and had the distress delivered by Replevin: And that William Fisher entered and let it to the Plaintiff for three years, pro-ut in the Declaration: And the Defendant ousted him; Et si, &c. And this Case was often argued at the Bar, and afterward at the Bench. The first question made, was, whether the entire Rent not being arrear, but only 10 l. for half a year, because of entry within the Proviso; for that the words thereof are, If the said Rent of 20 l. be arrear; and doth not say, if any part or parcel thereof, &c. And this being a Condition, ought to be taken strictly. But as to that, all the Justices agreed, That it is a sufficient cause of Entry; for the Rent is arrear, and he may have an Assise de redditu prædict. although half a years Rent is only in arrear, and it is within the words and intent of the Condition: Also this is not a Condition, but a Limitation of the use, which is to be construed according to the intent of the Parties: And the words are not, If 20 l. Rent be arrear; but, If the Rent of 20 l. be arrear; and that is said to be arrear, if any of the half year be arrear: Wherefore this Non-payment of the 10 l. and Replevin brought upon the Distress, are sufficient causes of Entry. The second question was, Whether this contingent and future use to rise upon Non-payment of the Rent, and the Replevin sued upon the Distress which was limited to Isaac Warden, his Heirs and Assigns, be transferable over by this Indenture of bargain and sale; for it was strongly urged by the Defendants Counsel, that it is a matter in privity and possibility only, which is not transferable before it falls in esse: But all the Justices resolved, that it being a matter of Inheritance, and being for the security of the payment of Rent, and waiting upon the Rent, might well be transferred with the Rent; and by the grant of the Rent, the penalty and advantage well passed: But if it had been a meer possibility, or a contingent Estate, not coupled with any other Estate then it had not passed. Thirdly, admitting it to be a sufficient breach, and that he hath the Title well conveyed unto him, the question then is, what Estate he gained by his Entry? because the words are, That he shall enter and retain until he be fully satisfied; Whether he hath such an Estate, as that he might make a Lease for three years out of it; and whether the Lessee upon such a Lease may maintain an Ejectione firmæ; for it was much insisted upon, and very strongly urged at the Bar to the contrary; but only that he should have the Lands quasi as a pledge, or as Tenant at sufferance, until the Rent was paid: But all the Justices resolved, that he had such an Estate, that he might make a Lease, and that this Lease was good, until the Rent was paid: And it is quasi a conditional Inheritance, which shall go to his Heirs and Assigns, but always

Co. Lit. 203. a
2 Rol. 799.

2 Rol. 48. 9;

1 Cr. 359, 503;

Co. Lit. 203. a

1 Rol. 846. 7;

Sect. 327.

2 Rol. 800.

Co. 5; 26. b.

ways determinable upon the payment of the Rent, as in the Case in Littl. 74. Feoffment reserving Rent, upon Condition to re-enter and retain until he be satisfied, it is no absolute defeat of the Estate, but a Retainer as a Pledge. Vid. 44. Ail. Pl. 3. 21 H. 7. 7. 38 Ed. 3. 5. Dy. 375. 14 H. 8. 4. Co. 8. fol. 96. The fourth question was, Whether this Rent of 10 l. due and demanded before the Fine levied (at which time for non-payment no use could be raised) and afterward the fine is levied, and then a Distress is taken for the Rent due, before the fine levied, and afterwards Replevin sued thereupon; whether this gives Title of Entry to William Fisher: And in this point the Justices were divided; for Houghton and Doderidge held, that he had not any Title to enter; for this Rent being due before the fine levied, by the levying of the fine the uses were raised, and not before, and that cannot extend to the Rent formerly arrear; for it ought to be arrearages after the use raised, and there ought to be a distress taken for that Rent which is arrear after the uses raised, and not to any Rent before; for the words are, If the Rent be behind, and distress taken, and Replevin sued; Then, &c. which cannot refer to any Rent due before the fine: But Croke and Montague held, that the fine levied, and the first indenture, 8 Jac (which was before the Rent due) were but an assurance; and therefore being levied hath his essence for the raising of uses, and is guided by the first Indenture, which was long time before the Rent due; for the execution of all things executory respect the original act, and shall have relation thereto, and all make but one act, although done at several times; as the Earl of Rutlands Case, Covenant to levy a fine of 100 acres within the year; the year expires, and a fine is levied of 80 acres, the fine shall be to the first use. Also there is no cause of entry, but for the Distress taken, and the Replevin sued, which are both after the fine: wherefore they held, that he might well enter. But if the Distress had been before the fine levied, and the Replevin after, it might peradventure have been otherwise: Wherefore for this point they would advise. Vid. Co. lib. 2. fol. 93. a. Bingham's Case, lib. 1. fol. 99. a. Wades Case put in Shelleys, Co. 9. fol. 7. Dy. 291.

The King *versus* the Executors of Sir John Dacombe
in the Exchequer.

(23)
Hob. 214.
2 Rol. 807.

King James made a Lease to Sir John Dacombe and others, of the Provision of Wines for his Majesties House for ten years, in trust for the Earl of Somerset: They made a Lease for all the term besides one month, rendring 900 l. per annum. The Earl of Somerset being afterwards attainted of Felony, the question was, whether the trust which was for the said Earl, was forfeited to the King by this attainder: And it was referred to
all

all the Justices of England, by command from the King, to be considered of, and to certify their opinions: And now Tanfield Chief Baron delivered all their opinions to be, that this trust was forfeited to the King; and that the Executor shall be compelled in equity to assign the residue of the Term, and the Rent, to the King: And he cited a Case to be adjudged 24 Eliz. where one Birket had taken Bond in anothers name, and was afterwards outlawed, that the King should have this Bond: And that in 24 Eliz. one Armstrong, being Lessee for years, assigned it to another in trust for himself; and being attainted of felony, this trust was forfeited to the King. But he said they all held, and so it was resolved in Case, that a trust in a freehold was not forfeited upon attainder of Treason. *Note*, This Case I had from the Report of Humphrey Davenport, who was of Counsel in this Case.

The King *versus* John Death, in the Exchequer, Trin.

15 Jac. Antea.

IT was found by Inquisition, that one York had recovered in an Action upon the Case, for words against John Allen, 500 l. Afterwards John Allen and Edward Allen purchased Land in Fee, and aliened it to John Death; York was outlawed, and so his Debt became forfeited to the King: The question was, whether the King should have execution of the moiety of the moiety of John Allen, or the entire moiety; and it was resolved, that he should have the entire moiety, although York should have had but the moiety of the moiety: But the Debt coming to the King, he shall by his Prerogative have execution of the entire moiety: And it was adjudged accordingly. (24)

Dalton *versus* Barnard, Trin. 16 Jac. Rot.

(25)

TRespas: Whereas he was seised in Fee of the Mannor of Ruskington in Ruskington, and Lefingham; and he, and all whose Estate, &c. have had Estrays within the Mannor, as to his Mannor appertaining: That the Defendant 9 Octob. 15 Jac. one Dr coming as an Estray into the said Mannor, apud Lefingham aforesaid, took and carried away: The Defendant pleaded Non culp. and found for the Plaintiff, and moved in arrest of Judgment, that the Ven. fac. was ill awarded; for the Ven. fac. is of Lefingham, where it ought to have been of the Mannor of Ruskington, or from both Wills (viz.) R. and L. Sed non allocatur; For it doth not appear, that the Prescription was in question, as now it ought to be brought: But the Trespass being alledged in L. and he pleaded Non culp. which may be, for that he never took the Dr, or for some other cause, the Ven. fac. was therefore well awarded: Wherefore it was adjudged for the Plaintiff. Ant. 191.

Califord and Joan his Wife *versus* Knight, Trin. 16 Jac.

(26)

Ant. 204. 5.
Ant. 65. 6.

Ant. 499.
Co. 4. 17. b

Action for words: Thou (præfatam Johannam innuendo) art *Mutcombs* hackney, thou art a thieving Whore, and a pockey whore, (innuendo that the said Joan had the French Pox) and I will prove thee a pockey Whore. The Defendant pleaded Non culp. and found against him, And after Verdict, it was moved in arrest of Judgment, that these words be not actionable; for the first words, Thou art *Mutcombs* hackney, and the second words, Thou art a thievish Whore, is not any accusation of Felony, for the may be thievish in that which is not Felony: And for that purpose two Presidents were cited, viz. 5 Jac. betwixt Powell and Hutchins; and Pasch. 3 Jac. betwixt Robins and Haberdan. And for the last words, the innuendo cannot make the words to be intended the French Pox, when it is not shewn by any other circumstances; as to say, that she was laid of them, or the like, and of that opinion was all the Court: Wherefore it was adjudged for the Defendant.

Violet versus Blague.

(27)

1 Cr. 296.
4 Infl. 134.

Prohibition prayed to the Admiralty; for that Violet libelled in that Court against Blague, supposing him to be in a Ship lying at anchor at Limehouse: The Libel was in nature of a Detinue at the Common Law; and because it is In corpore Comitatus, and not within the Admiralties Jurisdiction, the Prohibition was prayed; and a Case cited in 13 Jac. where a Ship lying at anchor at Blackwall, was broken by another Ship; and thereupon Suit being commenced in the Admiralty, a Prohibition was granted, Et per curiam, it was granted in this Case. Vid. Temp. Ed. 1. Avowry 192. 46 Ed. 3. Conufance 36. and Ed. 2 Corone 399.

Sly versus Finch.

(28)

R. 657.

Scire fac. versus Finch, Sheriff of Gloucester; For that the Plaintiff having brought a Fieri fac. upon a Judgment against one Turke, of 160 l. directed unto the Defendant Finch, he returned, that he had taken into his hands Goods to the value of 72 l. and had sold as much of them as amounted unto 11 l. 8cc. And that the residue did remain in his hands, pro defectu emtorum, until such a day; at which time he putting them to sale, they were then rescued from him: Upon which return the Scire facias was brought; comprehending all this matter; whereupon the Defendant demurred: And after argument at the Bar, it was argued at the Bench; and Houghton Justice held, that a Scire fac. lay not in this Case: It was agreed on both sides, that the

the Return is not good as to the rescue; and that the Sheriff by this return hath charged himself. The question only is, whether he hath charged himself by this Writ: And he held that he had not; and to that purpose he cited, 34 H. 6. 36. Dy. 241. and 9 Ed. 4. 50. For although the Sheriff hath returned, That the Goods are of the value of 72 l. It is not any Estoppel unto him, but that he may sell them for more or less, as he can get for them: And therefore it is not reasonable he should be charged with that estimated value, &c. Doderidge Justice to the contrary; And that the Sheriff is chargeable by the Scire facias; for he cannot diminish ought from the power that the Law gives him: And for that purpose he cited, 19 Ed. 2. Execut. 147. 2 H. 4. 15. 13 Rich. 2. 74. and the Statute of West. 2. is, Quod Vicecomes multoties dant responsiones, quod non possunt exequi precepta Regis propter resistentiam potestatis alicujus magnatis, de quo caveat Vicecomes de cetero; quia hujusmodi responsiones redundant in dedecus Dom. Regis & Coronæ suæ. Another question hath been made, whether the Sheriff hath charged himself by this return: And he held, that if he had returned only, Quod remanent in manibus pro defectu emptorum, he should have charged himself, for therein he had done his Office: And in such a case a Distringas should issue to sell the Goods, and deliver the money to the new Sheriff; according to 34 H. 6. But when he saith further, that they are rescued out of his custody, he therein hath misdemeaned himself; and therefore he is chargeable, 33 H. 6. 1. Dy. 141. Thirdly, he held, that the Sheriff had charged himself by this Scire fac. as well in regard of his misdemeanour, as also for that he hath his remedy over: Nor may we award a Writ de Venditioni exponas, because it is contrary to his own return, and so absurd and repugnant. To the objection, That peradventure he had seised the Goods again, so as now he may sell them, and make Execution upon a Venditioni exponas, he thereto answered, that he ought to have pleaded it to the Scire fac. and it had been a good answer. And whereas it was said, that he should not be charged upon this estimable value; as to that, he said, If a Fieri facias issue to the Sheriff, and he takes divers Beasts, and return, Quod cepi catalla ad valent. 100 l. and afterward the Cattel die for want of meat, in this case he shall have the value from the Sheriff himself; for it is now impossible they should be reduced to any other certainty; wherefore, &c. Croke Justice against both; and that in this Case he shall be charged with a Distringas Vicecomit. ad habendum denarios hic in curia. Montague Chief Justice accorded with Doderidge, &c. Et adjournatur.

Britton versus Wade.

Action *sur Trover*, and Conversion of two Lambs: The Defendant was found Not guilty for one of them; and for the other,

A u u 2

(29)

other, the Jury gave a special Verdict to this effect; The Prior of Denytre was seised of the Advowson of Norton, appropriated to their Priory, and also of the Vicarage of Norton, which Vicarage was endowed with the Altarage and small Tythes: And this appropriation and endowment was in the time of King John, and so continued until the reign of H. 6. when, upon the Priors Petition to the Pope, in regard the Priory was poor, &c. the Pope granted by his Bulls, Quod de cetero, the Prior should appoint one of his Monks to officiate the Cure, who should be removable ad nutum Prioris, &c. And whether the Vicarage was hereby dissolved, was the question: And it was argued at the Bar by George Croke and Davenport for the Plaintiff, and by Crew and Noy for the Defendant, And for the Plaintiff it was said, that in regard here was not any act of the Ordinaries, nor any Licence from the King, it might be objected, that the Vicarage should not thereby be dissolved. But it was thereunto answered, that the want of either of them cannot set asoot this Vicarage: For the Ordinaries act or concurrence was not requisite, it being good enough by the Pope only; because at that time the Pope was supreme Ordinary, to whom the inferior Ordinaries submitted: And it was good also without the Kings Licence, in regard that the making and endowing were Spiritual acts, and done by the Ordinary, the Patron not having any thing to do therein; Then eodem modo quod factum est dissolvitur; as in 14 H. 5. 16. it is said, that the making of a Vicar is a Spiritual act: The Statute of 15 R. 2. cap. 6. enacts, That upon every appropriation, &c. the Ordinary of the place shall provide, that the Vicar be well and sufficiently endowed; so as the power of the endowment is given to the Ordinary only; But in regard the Ordinary did not perform that which was the intent of the Statute (which was also defective) it was afterwards provided by the Statute of 4 H. 4. cap. 13. that in every Church appropriated, one should be ordained Vicar-perpetual, and be canonically instituted and inducted, and conveniently endowed by the discretion of the Ordinary; so it is plain, that the Vicar was to be endowed by the Ordinary only. And the Book 40 Ed. 3. 27. sets down how a Vicar was made by the Ordinary, by the consent of the Parson and Patron: But the Book saith, that the Ordinary might do it by the consent of the Parson sole: And further, that it might be done without licence from the King; for he takes nothing from the Temporality, but only from the Spirituality: As also, that the Ordinary may make restitution to the Parson again, if the Parsonage should happen to be too poor: And the difference is there taken by Mowbray, when a Lay-man gives Lands to one that is a Vicar, and when the Vicar is endowed by the Ordinary of the Parsons Land, &c. For in the first Case the Ordinary hath no power to dissolve the Vicarage, as to the Land; but otherwise in the

the other. Vid. 20 Ed. 3. Annuity 32. 16 Ed. 3. Annuity 24. & Br. 152. I. And therefore in regard the Ordinary might have dissolved it without the assent of any. The Pope then, who was Supreme Ordinary, might have done it: And he agreed, that to every Appropriation, the Patrons assent and the Kings Licence are necessary; for the Patronage is a thing Temporal, but the Endowment of the Vicarage is Spiritual, and so is the dissolving thereof, as it is said in Grendons Case, Plowd. 497. which fully proves this point, That that which the Ordinary of the Diocese might do, the Pope might have done, who had supreme Jurisdiction over all Ordinaries; Ideo frustra fit per plura quod fieri potest per pauciora. But admitting there should be any defect therein in this Case, yet it is found by the Jury, that in the Reputation, it was dissolved at the time of the Surrender of the Priory; And it is also found, that the Priory received the profits to their own use; and that at the time of the Surrender there was not any Vicarage; and that it was then accounted to be dissolved: Which, whether well or ill, is not now to be disputed; for the Law presumes that all things necessary thereto were then done, Concurrentibus his quæ in jure requiruntur. Vid. Co. Rep. 2. 48. a. Archbishop of Canterburys Case. But it was argued to the contrary on the other side, and four questions made in the Case; First, Whether a Vicarage-perpetual may be dissolved, after the Statute of 4 H. 4. And they held, it could not; for the Appropriation makes him to be Vicar-perpetual, which runs as well to those which are appropriated, as to those which are not. Vid. ^{4 H. 4. c. 13.} *le Stat.* the words whereof be, Shall from henceforth. Secondly, admitting it might be dissolved; yet whether the Pope had any such power to make an Ordinance against the Statute: And it was held, he could not; for he cannot dispence with an Act in the affirmative; admitting also, that the Vicarage might be dissolved by the Ordinary, yet the Pope could not dissolve it; for it appears by divers Statutes, that the Pope had not any right to meddle with any Advowsons, Benefices, &c. Vid. the Statute 25 Ed. 3. cap. 22. & 22 Ed. 3. of Provision and Premunire. Vid. 30 Aff. pl. 19. 14 H. 4. 14. N. B. 64. E. & 44. I. And in 11 H. 4. Hankford said, that the Popes Bulls cannot dispence with the temporal Law, nor meddle therewith, although they tend in ordine ad Spiritualia; as appears 18 Ed. 1. Munchensies Case; a multo fortiori, then not with the Statute-Law; and in the Statute of 28 H. 8. cap. 16. it is said, that all Dispensations, &c. from the Bishop of Rome were void, and of no force, contrary to the Law of the Land, and timorously suffered, &c. Then, when the Law prohibits him to meddle with Benefices, he may not dissolve Vicarages. Thirdly, admitting all the other, yet this Instrument is not sufficient; for although the rule, *Eo ligamine, &c.* is true, yet herein be not any sufficient words for dissolving, nor any which tant amount, nor so much as that the Priory shall take the profits; but

but only, that the Vicar should be governed, and be ad nutum Prioris, &c. Fourthly, the Jury concluding, that if the Plaintiff had Title, then they found for him; if not, then for the Defendant; the Plaintiff here hath not any Title; for the King grants unto him the Rectory or Parsonage, and the Vicarage cannot pass from the King thereby, as it should do in the case of a common person, 17 Ed. 3. Grants 57. And whereas it was alledged on the other side, that the beginning of Vicarages was in the eighth year of King John; Noy thereto answered, that if their beginning be known it was in Ann. 8 H. 3. and for that purpose cited Hoveden, fol. ult. de vita Will. Conq. And he said, that a Parsonage and Vicarage are two distinct Ecclesiastical Benefices, and the Parson and Vicar both have Curam animarum; the Parson habitualiter, the Vicar actualiter. Vide 31 H. 6. 14. 17 Ed. 3. 76. 5 Ed. 2. Quare impedit 165. And that although the Vicarage be spiritual, yet the Corporation is a thing temporal, which the Pope cannot dissolve, as himself hath confessed; for when he dissolved the Order of Templers, he said, Licet hoc de jure non possumus, volumus tamen de plenitudine potestatis, which was done in 5 Ed. 2. yet they were not dissolved here in England till the 17 Ed. 2. and then by authority of Parliament: And a difference was taken, when a Vicarage is dissolved into a Parsonage-presentative, there is not any loss or prejudice to the King; for what is lost in the one is gained in the other, and they both grow together: But when it is dissolved into a Parsonage-appropriatory, it is now come in manum mortuam; And the King thereby shall for ever lose his Title of Lapse; And therefore Trin. 37 Eliz. Austins Case. If there be an union of a Vicarage to a Dean and Chapter, or Colledge, it ought to be with the Kings consent. Vid. Temp. R. 2. Grants 104. 6 H. 7. 13. 50 Ed. 3. 26. In the argument of this case it was said, that a Donative cannot fall in Lapse, but the Patron may lose the profits thereof if he will: But if any take the profits from him, he cannot maintain the Action, but he ought to put in his Clerk, and he maintain the Action. Vid. 33 Ed. 3. Aide 107. 6 H. 7. 14. 17 Ed. 3. 45. And at another day in arguing this case, a Case was cited betwixt Parry and Bancks 12 Jac. in the Exchequer, a Parsonage was appropriated to the Deanry of S. Asaphs in 24 H. 8. and a Vicarage endowed; and afterwards the Bishop in 24 Eliz. dissolved the Vicarage, and Parry pretending that this Vicarage was not dissolved, but that it was in the Kings hands by Lapse, obtained a Presentation: And it was resolved by the Barons of the Exchequer, that after the Statute of 31 H. 8. which made Parsonages Lay-tees, the Ordinary may not dissolve the Vicarage, when the Parsonage is in a temporal hand; for that should be to destroy the Cure: But being in this case appropriated to the Dean, it so remaining in his hands, may very well be dissolved: And according thereto was the opinion of Justice Do-deridge.

Termino

Termino Hillarii,
Anno decimo sexto JACOBI Regis.
in Banco Regis.

Salkold *versus* Skelton, quod vide ante pag.

The Case was now moved again, That the Defendant, although he did not make his Abowry to have return, should notwithstanding have Judgment to return; for it appears by the Declaration, that the Defendant took them; so he had possession; and that by the Replevin sued, they were delivered to the Plaintiff: Wherefore when the Writ is abated, it is reason that the return of them should be adjudged to the Defendant, that he may be in statu quo prius: As if the Plaintiff were non-suited before the Declaration, the Defendant should have return: But there the reason is, because he is prevented of his Abowry, so as he cannot make it: And of that opinion was all the Court, That return should be awarded in this Case, and in every Case where it appears, that the Defendant was in possession of the Beasts, &c. if they be delivered by Replevin, 36 H. 6. 35.

(1)

Hurleston *versus* Woodroffe.

DEbt: Supposing that he let certain acres of Land, Et unum ovile, Anglice a Sheep-walk, cum pertinentiis in D. for years rendering Rent: And for Rent arrear he brought the Action: The Defendant pleaded Non debet, and found for the Plaintiff: And it was moved in arrest of Judgment, that this Declaration was not good, because a Sheep-walk is but in nature of Common, which cannot be demised without Deed; and the Declaration not mentioning it to be by Deed, was not good: But Houghton said, they have such phrases in Norfolk, that it is known by the name of Land, and there be Leases of Land with the Sheep-walk: Also, if it should be taken as Common, not being demised with the Land, yet by the name cum pertinentiis, it should be intended to be appurtenant, and to pass without Deed, as Land with the advowson, and a Rectory with the Tythes: And the Verdict finding quod debet, it shall be intended, that it was a good and available Lease; Wherefore it was adjudged for the Plaintiff.

(2)

1 Cr. 432:

Samuell

Samuel *versus* Hoder.

(3)
St. 21 H. 8.
c. 19.

Post. 623.

Ant. 28.

3 Cr. 329.
Ant. 27. 8.

REplevin against two; the one pleads Not guilty, the other justifies, by reason of an amercement in a Leet; whereupon it was demurred and adjudged for the Avowant, and the Issue was after tryed, and found for the Defendant, and Damages and Costs assessed for both: And now moved, that no Judgment should be given for the Damages and Costs, for it is out of the Statute 7 H. 8. and 21 H. 8. And the Court at first were in much doubt thereof; but afterwards, upon consideration of the Statute which gives costs to the Defendant in every Action, where the Plaintiff should have costs, they held, that the Avowant should have costs, but advised him to release his damages, and to take his Judgment for the costs, and to have return; and so it was adjudged. Vid. Pasc. 38 Eliz. Rot. 892. betwixt Chapley and Har-
slay like Judgment was given: And Mich. 44 and 45 Eliz. betwixt Mackworth and Shephard.

Bradford *versus* Woodhouse, Hill. 12 Jac. Rot. 416.

(4)
1 Rol. 593. 4.

1 Cr. 160.

ERROR a Judgment in the Common Bench: Upon a Nihil dicit, the Error was assigned, because Bradford being an Attorney, had brought an Action of Debt there, and demanded 10 l. upon eight several retainers; First, because the Defendant there as Solicitor to Sir Thomas Elvys, retained him to prosecute an Original Writ of Trespass for the said Sir Thomas against one Williamson, and to be Attorney for the said Sir Thomas Elvys, quamdiu placuerit the Plaintiff and Defendant, capiendo his Fees and Expenses of suit of him: And alledges, That he prosecuted the said Writ, which continued three Terms, and that he had laid out therein to divers Officers 13 s. 4 d. and 10 s. were due unto him for his Fees, so as 23 s. 4 d. were due unto him; per quod Actio, &c. The second retainer was by him for the said Sir Thomas Elvys to be his Solicitor in the Kings Bench quamdiu placuerit the Plaintiff and Defendant, capiendo his Fees, &c. And alledges that the Suit continued there for four Terms, wherein he was Solicitor, and had therein laid out such a Sum to the Officers, &c. for which, &c. Et sic de aliis; but three of them were upon his own retaining the Plaintiff in his own Actions: And it was moved, That the Judgment was erroneous; for although an Attorney may have Debt for his Fees, and Sums of money which he disburseth, yet it ought to be against him for whom he is Attorney, who is the Master, and not against the Servant, or Solicitor who only retained him, and who hath not any Profit thereby, nor is there any Consideration for which he would be charged: But upon the first motion (absente Doderidge) it was over-
ruled

ruled upon reading of the Record that the Servant retaining him capiendo of him the said fees, it is a good contract, and that the Action well lies; and it was therefore compared to the Case where one promised to a Surgeon 10 l. for curing another, or to a Carpenter to make an house for I. S. he will pay for it; and to Simpsons Case, where one promised to a Taylor, that if he will make a garment for one of his Servants, he will pay him; That an Action of Debt or an Assumpsit well lies in such Cases; So here, because these are Acts, as Acts done by him who makes such a contract, and they be lawful Acts; but to maintain such a Suit for another is not lawful; and the Judgment without any further day given was affirmed. Vid. Dy. 256.

1 Cr. 107, 194.
3 Cr. 425, 459.
1 Cr. 194.

Haydon *versus* Mynn.

Error of a Judgment in Debt in the Common Bench, and assigned; Whereas the Defendant appeared by I. S. his Attorney, and Judgment was given against him by Nihil dicit; That the said I. S. was no Attorney of the Common Bench at the time of his appearance, nor at any time within the said Term: And the Defendant pleaded In nullo est erratum; and because it appears that the Defendant appeared by the said I. S. and impailed until another Term; so the Court admitted him to be an Attorney, and it is against the Record to say he is not an Attorney: Also if he were not an Attorney of Record before, yet this admittance of the Court doth implicitly admit him to be an Attorney in this Action, and he is a good Attorney in this Suit; wherefore this cannot be assigned for Error: And although the Defendant in the Common Bench hath brought a Writ of Error, and it is not demurred upon this Error assigned, yet it was held that the now Defendant may well take advantage thereof, and that this Plea, In nullo est erratum, is in nature of a Demurrer; wherefore the Judgment was affirmed.

(5)

Ant. 359.

Ant. 12. 29.

Sir Edmund Button *versus* Awdley.

Error to reverse an Outlawry: The Error assigned, for that the Outlawry being in Suffex, the Outlawry is returned after the quinto exactus ideo utlagatus est, and doth not say, per judicium Coronatorum: And for this cause it was reversed.

(6)

Sir John Brett *versus* Cumberland.

Covenant: The Case was, Sir John Brett, and Margaret his wife as Assignee of King H. 8. and Queen Eliz. bring a Writ of Covenant against John Cumberland, Executor of William Cumberland: For that Queen Eliz. by her Letters, Patents, dated Anno 26 Regni sui, let unto the said William Cumberland

(7)
Ant. 399.
1 Rol. 517. 8.

F r r

one

1 Rol. 518.

1 Rol. 517.
Ant. 399.
Ant. 398.
Moor 135.

Ant. 240.

1 Cr. 188, 580.
Ant. 309.

one Water-mill in Southill in the County of Bed. for 31 years; wherein are these words, Et prædict. Willielmus Executores & assignati sui prædict. molendinum & domus, & ædificia inde sufficienter reparabunt, and shall leave them sufficiently repaired, and Mill-stones therein; and shews, that King James in the 12 year of his reign, granted unto the Plaintiff the Reversion, and that William Cumberland dyed possessed, and made the Defendant his Executor; and that after the grant to the Plaintiff, neither the said William Cumberland in his life-time, nor the Defendant after his decease, had sufficiently repaired the said Mills, but suffered them to go to decay in the Timber, and shews in certainty how; and that he did not leave any Mill-stones at the end of the Term; for which, &c. The Defendant pleads, that William Cumberland assigned over all his Estate 43 Eliz. to William Fish, who entered, and paid the Rent to the Queen, and afterwards in prim. Jacobi paid the Rent to the King; and since the Reversion was granted unto the Plaintiff, paid the Rent unto the Plaintiff; which he accepted: Et hoc, &c. Whereupon the Plaintiff demurred; This Case was oftentimes argued at the Barr: The first question was, whether these words in the Patent, to which the Queens Seal was only affixed, shall enure as a Covenant to bind the Lessee and his Assigns: And it was resolved that it should: for the Lessee takes thereby, because it is matter of Record; although in shew they be the words of the Lessor only, yet he accepting thereof, and enjoying it, it is as well his Covenant in fact, and shall bind him as strongly as if it had been a Covenant by Indenture. Vid. 40 Ed. 3. 45 Ed. 3. 11. 38 Ed. 3. 8. Pasch. 8 Jac. inter the Lord Ever and Strickland. The second question, and the more difficult, was, whether the Assignee of a Reversion who hath accepted the Rent from the Assignee of the Term, and so taken him for his Tenant, shall charge the Executor of the Lessee for this breach of Covenant made after the assignment of the Term, and after the assignment of the Reversion: And as to this point it depended long in question; and after much argument was at length resolved, that he was chargeable with the breach of this Covenant, and that the Assignee of the Reversion should have the Action, by the Statute of 32 H. 8. For it is a Covenant in Fair, and by the express words runs along with the Land: And notwithstanding the Assignment, the Covenantor and his Executors are always chargeable; so that neither by the Assignment over of his Estate, nor by any act he can do, can he discharge himself or his Executors, who are chargeable by the act of their Testator, having Assets as long as the Lessor continues the Reversion in him; For the Executors are not chargeable, by reason of the privacy of Contract, but by reason of the Covenant in self, and by the express words of the Statute

Statute of 32 H. 8. such Remedy as the Lessor might have had St. 32. H. 8. c. 34. against the Lessee, or his Executors, such Remedy the Assignee shall have against them it being a Covenant in Fact, which runs with the Land: But otherwise it is of a Covenant in Land, which is only created by the Law, or of a Rent, which is created by reason of the contract, and is by reason of the profits of the Land, Ant. 334. wherein none is longer chargeable with them, than the privy of the Estate continue with them: And this Covenant may charge the Assignee who hath the Estate, and the Lessee and his Executors who made the Covenant all at one and the self same time; but Execution shall only be against one of them: For if he sue an Action against the one, and after against the other, as he well may do, if he take several Executions, he who is last taken in Execution shall have an Audita querela: Wherefore it was adjudged for the Plaintiff. Vid. Co. lib. 3. fol. 22. 3. lib. 5. fol. 16. b. and 24 Dy. 27. & 114. Nat. Br. 146. Temp. Ed. 1. Covenant. 16, and 28

Hill *versus* Wade.

Assumpsit in consideration that he would buy such Land of the Defendant, and pay unto him 40 l. for it; the Defendant promised to pay unto the Plaintiff 9 l. which 1. s. owed unto the Plaintiff, when he should be thereunto required: And alledged in fact, that he bought the Land and paid 40 l. for it, and that the Defendant licet *sepius requisitus*, had not paid the 9 l. After Verdict, upon Non assumpsit pleaded, and found for the Plaintiff, it was moved in arrest of Judgment that the Declaration was not good, because there was neither time nor place alledged of the request: And although Gwyn for the Plaintiff oftentimes moved, that it was not material, because the Defendant pleaded Non assumpsit, and so hath not taken advantage thereof; the Court resolved, that forasmuch as it is a strangers Debt, and was no duty by the Defendant before the promise, nor payable but upon request, and so no breach until request be made; therefore to enable the Plaintiff to the Action, an Express request ought to have been alledged, and a *sepius requisitus* will not serve: Houghton, Justice, took this difference, where a request is upon a Duty; as if I sell an House for 5 l. to be paid upon request, there a licet *sepius requisitus* is sufficient, and where it is upon a collateral matter; for there he ought actually to alledge a request, although Issue be joyned upon the Assumpsit: And this difference was affirmed in Griggs Case in a Writ of Error: And so the opinion of the Court was against the Plaintiff: Et adjournatur, and afterwards adjudged for the Defendant.

(8)

2 Vol. 75.
Ant. 183.

1 Saund. 89.

Danderidge *versus* Johnson Parson of Burghfield.

Prohibition was prayed to stay a suit in the Spiritual Court for Cythes of a Fulling-Mill; wherein he suggested in the Spiritual Court, that the Defendant there by his Mill

(9)

1 Rol. 641.

fulled every week forty Clothes, and did gain by every Cloth 2 s. Wherefore he demanded the Tythes, whereas by the Law of the Land he ought not to demand Tythes of such Mills: and upon this surmise only, that by the Law of the Land Tythes are not payable, a Prohibition was granted; for Doderidge said, that of such things whereof the gain comes only by labour of men, Tythes are not payable; But of things renovant, &c.

Fawns Case in the Court of Wards.

(10)
Hob. 253.
St. 7 Jac. c. 15.

One Brediman was endebted to Richard Coles by a Statute in 2000 I Coles made his *Feme* Executrix, and died; She afterward married with Edward Fawne, who was endebted to the King, by Bond acknowledged in the Court of Wards; He and his *Feme* by deed enrolled 14 Jac. in the Court of Wards, assign unto the King that Statute for the payment of the said Debt, and whether this assignment were good, or void by the Statute of 7 Jac. which enacts, that no debt shall be assigned to the King by his Debtor accomptant, or other than such Debts as did before originally grow due to the Kings Debtor or Accomptant bona fide, and that all other Assignments should be void; it was resolved by the two Chief Justices, and the Chief Baron, that this was a good assignment; for although this debt is not due unto him originally, but in right of his wife, who had it from her Testator: Yet soasmuch as they have the sole Interest therein, and the Baron who is the Kings Debtor may discharge it by his release, it was resolved that it was all one as if it had been made to him in his own name, and within the meaning of the makers of that Act to be assigned; for the intent of that Statute is only to restrain Assignments of Debts which are not due to the Debtors themselves, but assigned to, or by him to other persons; wherefore it was resolved that this Assignment was good, and that Process should be awarded for the levying thereof.

Pincomb *versus* Thomas.

(11)]

Ant. 487.

One lets a Tenement, a Close whereof was a Wood, and commonly known by the name of a Wood, and in the Lease was an exception of all saleable Woods now growing, or which shall grow hereafter, which have been sold by the Lord of the Premises, with free Entry, Egress, and Regress, for selling, making, and carrying of the same at all times convenient; And whether the soyl of the wood was passed hereby, was the question; and resolved by all the Justices clearly, that in this Case the soyl was not excepted, but passed to the Lessee.

Gray versus Gray.

DEbt upon an Obligation for performance of an award, which (12)
 was, that the Plaintiff should not prosecute nor proceed in
 the same Term, in such an Action; and it was held by the Court to
 be a good award. Vid. 3. 6 H. 6. 23. 18 H. 6. 9. 5 H. 7. 2. 19 Ed.
 4. 1. Secondly, it was agreed, that the award being, that he should
 not prosecute in such an Action in the same Term, that the Entry
 of continuance from Term to Term is not any Breach; and by
 Doderidge and Houghton Justices, if one be obliged that he shall
 not continue such a Suit, if he continue it by Attorney, it is a breach
 of the Obligation; but if the Attorney enter the Continuance
 without his privity, it is no breach.

Egertons Case.

ERror upon a Judgment in the Common Bench in a Writ of (13)
 Covenant, where two Errors were assigned, first, for that
 a Fine being levied by Indenture, declared the use to be to the
 Wife of J. S. And the Court of Common Bench adjudged it to
 be an Estate for life, whereas it is not so expressed; and as to that
 point the Judgment was affirmed; for Doderidge said, although
 the Fine be but as a grant, yet an Estate for life may pass. Vid.
 Cok. 1. fol. 106, Shellys Case. Another Error assigned was,
 that the Covenant was for the Tenement called Broceknouse in
 parochia de D. in tenura Willielmi Fritton, and so the first Decla-
 ration was; but the second Declaration is of the Tenement cal-
 led Broceknouse in parochia de D. &c. But Justice Doderidge said,
 that in regard there is such precise certainty before, it is no mate-
 rial variance; and principally for that the second Declaration is
 but a recital of the first, and refers it self thereto; for it begins, Ant. 104.
 alias prout patet per recordum, &c. Where to the Court agreed;
 and the first Judgment was affirmed.

Termino Paschæ,
Anno decimo septimo JACOBI Regis.
in Banco Regis.

Willis *versus* Neilder.

- (1) **T**respas: for that he took and carried away apud D. three load of wheat, being severed for Tythes contra pacem, &c. omitting the words, vi & armis: After Verdict for the Plaintiff upon Not guilty pleaded, it was moved in arrest of Judgment, that the Bill should therefore abate; for it is the essential part of the Declaration, which induceth to have a fine for the King; and it is not aided by the Statute of Jeofayles: And of that opinion was the whole Court; wherefore Judgment was given for the Defendant. And a President was shewn, Hill. 13 Jac. betwixt Welsted and Taylor, where Judgment was reversed for taking a bag of money, because vi & armis was omitted, being assigned for Error.

Hob. 180.
Ant. 443.

Smithson *versus* Cage.

- (2) **E**jectione firmæ: Upon Evidence to the Jury at the Bar, a question was moved: There being a Copyhold Messuage called Symonds, whereto divers Copyhold Lands were appertaining; the said Messuage called Symonds, cum pertinentiis, being surrendered to the Lord, and all his right therein, whether by that Surrender the Copyhold Land shall pass, or only the said House, with the Curtilages thereto appertaining: And Yelverton the Kings Attorney, and Walter, moved, that in Case of a Copyhold, the entire Land should pass: But all the Court held, that it is all one in case of a Copyhold and Freehold; and that nothing should pass but the House, with the Orchards, Pards, and Curtelage and Garden, by these words, cum pertinentiis. A second question was moved, if Baron and Feme Copyholder, in right of his Feme surrender out of Court into the hands of the Steward; and she was examined by him, it not being proved that he was Steward by Patent, nor any special Custom to warrant it; whether

Co. Lit. 56. b.
16. 17. 36. 16.

Co. 4. 30. b.
Co. Lit. 61. b.

ther it was good or not; and they all resolved that it was: And Montague said, that he had known it to be so adjudged.

Spicer versus Spicer.

Ejectione firmæ: Upon a special Verdict, the Case was; That one Spicer was seised of Land in Fee, holden in Socage, and devisable in Savelkind, and devised it to his *Feme* for her life, paying 3 l. per annum to Thomas his Son during his life; and that he should take but two load of wood for fire-bote; And if she died before the said Thomas, then he devised all his Land to Richard his Son, paying to the said Thomas 3 l. per annum, and paying to such one of his sisters 20s. and to another sister 20s. The *Feme* dies, Richard enters; the question was, what Estate Richard had by this Devise: And it was adjudged, that he had a Fee; for when he devised it to his *Feme* for life expressly, &c. and to Richard generally, without limiting the Estate, and appointed him to pay to Thomas 3 l. per annum during his life, that carries in it an intendment that he should have Fee, especially when his father therein further willed, that his Son Richard shall pay two other Sums in gross, and none of them to be out of the profits, it is by intendment, and by implication a Fee: Wherefore upon the first argument it was adjudged for the Defendant; for they said, that these things which have been so often adjudged, ought to rest in peace. Vid. 4 Ed. 6. Tit. Estates 78. 29 H. 8. Br. Testam. 18. Dy. 371. Wellock and Hamonds Case, 32 & 33 Eliz. cited in Boraftons Case, Co. 3. 20. 21. and Colliers Case, Co. 6. 16.

(3)

Ant. 416.
Post. 591, 599.
Co. Lit. 9. b.

Palfrey's Case.

One Palfrey was Indicted, that he was communis Barrectator litium, & discordiarum inter vicinos seminator, & pacis Regis perturbator, in magnum contemptum Domini Regis, & malum exemplum aliorum delinquentium, omitting these words, contra pacem Domini Regis, vel contra formam Statuti: And exception was taken for these causes, and for that he did not alledge in what point of special matters he was a common Barrector, or where he was communis pugnator, or communis pacis perturbator: But this Exception was not allowed; for the Indictment was good without alledging special matter: But for the omission, of contra pacem, &c. it was held to be insufficient, for it is an essential part of the Indictment: and therefore was reversed.

(4)

Fitz-Hughs Case.

Fitz-Hugh being Indicted, traverseth the Indictment: And it was found against him, and Exception taken, because upon the Dorse of the Writ of Distringas, it was returned, Executio istius

(5)

Ant. 443.

istius brevis, &c. and not the Sheriffs name : But it was held to be good enough, or if it were not, it should be amended ; for the Ven. fac. being good, and there being the same Jurors who were returned upon the Ven. fac. it was his own fault ; for he who traverteth, ought always to bring the Record, and look to the return of Writs ; wherefore it was held, that it should be amended : But if the Ven. fac. had been Album breve, without a return, it had been otherwise, for that cannot be amended : Wherefore rule was given accordingly, that it should be amended.

Booth *versus* . . .(6)
Post. 542.1 Cr. 275.
Hob. 246.

SCire fac. to have Execution of a Judgment for damages recovered in an Action of Trover and Conversion against an Executor, who pleaded *Nunques Executor*, and Issue thereupon ; the Ven. fac. was, *Ad triandum exitum inter partes prædict. in placito debiti*. And a Cryal was thereupon, and this matter was assigned in arrest of Judgment, and held good by all the Court ; and a Ven. fac. *denovo* was awarded.

Patricks Case.

(7)
Post. 531.

One Patrick being outlawed upon a Quo Warranto brought against him for keeping of an Inn, brought a Writ of Error to reverse the Outlawry : And the Error assigned, was, because he was outlawed per *judicium Coronatorum*, he doth not shew the name of any of the Coroners : And for this cause it was reversed.

Smith *versus* Bower.(8)
3 Cr. 236.

Error of a Judgment in the Kings Bench, where Debt was brought by an Executor for arrearages of Rent for seven years, reserved upon a Lease for years, and the Demise was in London of Lands in Norfolk : The Defendant as to two years arrearages pleaded *Non detinet* ; and thereupon Issue was joyned : As to the residue, he pleaded, that the Testator entered into parcel of the Land demised ; and hereupon Issue was also joyned. The first Issue was tried in Trinity Term in London ; and the second Issue at Norfolk Assises afterwards : But no continuance was made by *Curia advisare vult*, from the day of the return of the Distringas in London, to the day of the return of the Distringas in Norfolk ; neither any entry of the Judgment respited quousque. The second Issue was tried as of right it ought to be in this case : And the want of this continuance was assigned for Error, and that it was not helped by any of the Statutes of Jeofails : But all the Justices and Barons held, that it is aided by the said Statute, as well after Verdict as before, and as well

well where there be two Verdicts, as where there is but one. Vide Pasch. 10 Jac. Rot. 104. Debt was brought in the Kings Bench, upon four Obligations to pay money; three of them were tried in London in Trinity Term, the fourth was tried at Lent Assise after, and there was not any continuance from Trinity Term unto Lent Assise, which was much insisted upon; and yet Judgment was given for the Plaintiff.

Parker *versus* Sir John Curson and Dame Magdalen his wife, Intrat. plac. Coron. Hill 16 Jac. Rot. 433.

INformation for the King and himself: For that the said *Feme* (9) being above the age of sixteen years from 10. Septemb. 15 Jac. unto 9. Septemb. 16 Jac. did not repair to any Church; wherefore for eleven months he demanded 220 l. whereupon the Defendants appeared, and the Record was entred, Et prædict. Johannes Curson & Magdalena veniunt, & prædicta Magdalena dicit, quod ipsa non est inde culpabilis, & de hoc ponit se super patriam, & Attornatus Domini Regis similiter: Which being, tried at the Bar this Term, it was proved that she was sick for a great part of the time, and thereby thought to have excused her: Yet forasmuch as it was alledged that she was a Recusant both before and after, it was said by the Court, that it shall not excuse her; For it shall be intended, that she obstinately forbore during that time, &c. wherefore she was found guilty for all the time. And it was afterward moved in arrest of Judgment, that an Information lies not against Baron and *Feme* for the Recusancy of the *Feme*, to recover 20 l. the Month; For the Statute of 7 Jac. cap. 6. appoints, That if a *Feme Covert* be convicted, she shall be committed to Prison; and if the Husband redeem her out of Prison, he shall pay 10 l. per mensem: So that Statute being Lex posterior, doth abrogate the former Law in this point, that the Husband shall not be charged with the Recusancy of his Wife, but only at 10 l. the Month; and not with this, but to redeem her out of Prison: Sed non allocatur; For this Statute doth not alter any of the former Laws, but prescribes, that a *Feme Covert* Recusant being convicted, if she after three Months do not conform her self, she shall be committed to Prison, unless the Husband will pay 10 l. for every Month that she shall be out of Prison, and not conformed. Secondly, that this Information is not good, because the Offence is alledged to be from the tenth of September, 15 Jac. unto the ninth of September, 16 Jac. which is thirteen months complete, except one day: Then being thirteen months, and he demanding but for eleven months, and it appears not for which of the said months the Penalty is demanded, the Demand is uncertain: As if one should demand 20 l. upon a Bond of 40 l. and doth not acknowledge satisfaction for the residue, it is ill:

Ante 366.
Ante 499.

Ante 288.

Ante 5.

Sed non allocatur; For although he doth not demand so much as he might, yet it is well enough, and for the Defendants advantage, and the recovery shall be intended for the eleven months, when she was first absent; and the addition of more time is not material: And it was said at the Bar, that so it had been before adjudged betwixt Smith and Weatherheard, in an Information for using a Trade, not being Apprentice, &c. Thirdly, it was objected, that here was not any Issue joyned; For it is only the plea of a *Feme Covert*, and the *Baron* doth not joyn with her therein, and a plea by a *Feme Covert* is void: And the Court doubted thereof at first; But it was afterwards moved, that the Docket was, *Quod Johannes Curson Miles Magdalena uxor ejus, &c. placitant non culp.* And it was thereto said, that that was the warrant for the Roll, and is but the mis-entry of the Clerk, and ought to be amended, and the Husbands name inserted: But it was thereunto answered, that it could not be done, the Record being of another Term, and the Issue joyned, being only the Issue of the *Feme*; the Verdict passed upon that Issue cannot now be amended; For it was said, that the Docket-roll is but for remembrance to the Clerk, and to instruct the Master of the Office of the business in Court, and as a Kalender thereto; But when the Roll is made up, and of another Term, it cannot be guided by the Docket: Sed non allocatur; For it being manifest to the Court, that they both appeared, and the Docket is, that they both pleaded, it is a sufficient guide to the Clerk to draw the Plea in both their names: And when he omits the *Barons*, it is but the misprision of the Clerk, which shall be amended; and it was adjudged that it should be amended, and the Judgment for the Plaintiff. Vide 2 R. 3. 17. 4 Eliz. Dy. 211. But not, if the *Baron* and *Feme* plead, *Quod ipsi non sunt inde culpabiles*, and it is found, &c. this finding is ill, and cannot be amended: For it would alter the Issue if it should be amended.

Sparham versus Pye.

(10)

Ante 407.

Action for these words; Sparham did steal a Mare, or else Godwin is forsworn: After Verdict, upon Non guilty pleaded, it was moved in arrest of Judgment, that these words be not actionable; For there is not any direct affirmance or charge in them: But Richardson for the Plaintiff moved for Judgment, For it is shewn in the Declaration with an averment, that Godwin never swore any such matter, and then it is a speech of his own imagination; As if he should say, J. S. is a Thief, if J. N. his report be true, with an averment, that he never made any such report: It hath been adjudged that the Action is maintainable:

But

But all the Court here held, that an action lies not ; For it is not a direct slander of him, and none hath cause upon these words to draw his Life 'or Name in question, and then it cannot be a loss unto him : Wherefore without argument it was adjudged for the Defendant.

Garrard *versus* Regem.

ERror to reverse an Outlawry in a Quo Warranto ; The first (11)
Error assigned, because he had not any addition in the Exi-
gent : Sed non allocatur ; for neither in Informations, nor in re- Post. 576.
turn of Rescous, is it the course to have additions. Another Error
was assigned, because the Exigent is returned, Ideo utlegatus est ;
And he doth not name any Coroners : Sed non allocatur ; for this Ante 528.
Outlawry being in London, where there is not any Coroner, but Ante 358.
the Mayor for the time is perpetual Coroner ; and the course is
not to return there per Judicium Coronatorum, but generally, Ideo
utlegatus est, 21 H. 7. 23. Dyer 317.

Oliver and his Wife *versus* Stephens.

Action for words to the *Feme*, Thou art a Witch ; After Ver- (12)
dict for the Plaintiff, It was moved in arrest of Judgment,
that an Action lies not for these words ; For it cannot be known,
and if it could, it is not shewn that any fact was committed by
her : And of that opinion were all the Judges (absente Montague)
but being afterward moved when he was in Court, he held, that Ante 399.
the Action well lay ; for by the Statute of primo Jacobi, every 3 Cr. 571.
Witchcraft is punishable by Pillory, or as Felony : Wherefore
the general words will well maintain the Action ; Wherefore the
Court would advise thereof until another Term.

Hawkes *versus* Auge.

Action for these words, Thou art a Witch, and by thy means (13)
I have lost my Mare. It was moved in arrest of Judgment,
That these words be not actionable ; for the first words are too
general, That by her Witchcraft his Mare was lost : And of that
opinion was all the Court, (absente Montague) and gave rule
that Judgment should be entered for the Defendant.

Pendavis *versus* Kensham, Hill. 16 Jac. Rot. 742.

DEbt upon an Obligation : The Defendant pleads, That the (14)
Plaintiff in the Kings Court at Penwarth, brought Debt
upon this Obligation against one Tregore, who was obliged with
him in the said Bond jointly and severally, and recovered, and
had

Ante 493.
1 Cr. 46.
Co. 8. 133. a.

Ante 338.

had him in Execution; and that the Gaoler voluntarily suffered him to go at large: And upon this plea it was demurred; First, because he doth not shew, that this Court being a private Court, had power to hold plea; Which he ought to shew to the Court here, otherwise the Court cannot take Consuance of their Jurisdiction, and otherwise the Judgment is void, & coram non iudice: And of that opinion was the whole Court. Secondly, That this Plea was not good in substance; for the escape of the Prisoner, although it be by the voluntary permission of the Gaoler, is not any discharge of the Debt, and by consequence the Action lies against the other, Coke 5. fol. 86. Blumfields Case. And so it is held, where two be in Execution, and the one escape; This is no cause of Audita querela: and of that opinion was the whole Court. And therefore being no plea for both these reasons, it was adjudged for the Plaintiff.

Warner's Case.

- (15) **W**Arner one of the Churchwardens of Allhallows in London, prayed a Prohibition; For that whereas by the custom of the said Parish, the Parishioners used every year to elect Churchwardens, one of the Parish, who had born the Office of Scavenger, Sidesman or Constable; And that every year one who had been elected Churchwarden, is elected to continue a year longer, and to be the Upper Churchwarden, and another is chosen to him, who is called the Under Churchwarden; That such a choice being made in that Parish of the said Warner to be Churchwarden, the Parson withstanding that election, nominated one Carter to be Churchwarden, and procured him to be sworn in the Ecclesiastical Court, and denied the said Warner as Churchwarden according to the election of the Parishioners; and this by colour of the late Canons, That the Parson should have the election of one of the Churchwardens: And this being against the custom, a Prohibition was prayed, and a president shewn in the Common Bench, Pasch. 5 Jac. for the Parishioners of Walbrook in London, where such a Prohibition was granted; For it being a special custom, the Canons cannot alter it, especially in London, where the Parson and Churchwardens are a Corporation, to purchase Lands, and demise their Lands; and if every Parson might have election of one Churchwarden without the assent of the Parishioners, they might be much prejudiced, &c.

1 Cr. 552. 589.
Post. 670.

Parkhurst *versus* Powel.

(16)
Noy 22.
Hob. 209.

Error of a Judgment in the Common Bench, in an Action upon the Case for himself and the King; For that whereas he had a Capias ut legatum after Judgment against J.S. and delivered

livered it to the Sheriff of Denby to execute, who seeing J. S. and being required to execute it, did not execute the same, but suffered him to go at large, and he eschewed himself to places unknown: And afterward the said Sheriff returned here to Westminster, Non est inventus, in deceit of the King, and prejudice to the party of his said Debt: The Defendant pleaded Not guilty, and it was found against him, and Judgment accordingly; For which he brings Error, First, because the Action is brought by the King and himself, where it ought not to be so brought: Sed non allocatur; For it is the Kings Writ, and the King is to have the benefit thereof as well as the party: Wherefore the Action here is well for the King and party, and he shall be fined thereupon. Secondly, for that the Trial was de vicineto de Westmonast. where the offence is alledged to be at D. in Comit. Denbigh, and from the said place the Venue ought to have been: Sed non allocatur; for the false return was here at Westminster, which is the cause of the Action; wherefore the Judgment was affirmed.

Post. 361.

Ante 361.

Co. 7. r. b.
Hob. 209.

Geffrey Booth *versus* Potter.

Ejectione firmæ of the Lease of Henry Fowler, of the Rectory of Much-hampton in the County of Gloucester; and that the Lessor was presented by the Lord Windsor upon the deprivation of Anthony Laphorn before the High Commissioners; Upon Not guilty pleaded, the Defendant claimed under the said Anthony; Upon Evidence it appeared that the Adowilson was the Inheritance of the Lord Windsor, who granted the next avoidance thereof to Doctor Gooch: And after the Church being void, one Richard Fowler, Father of the said Henry Fowler, dealt with the said Doctor Gooch, the Church being void, to permit the Lord Windsor to present the said Henry Fowler to the said Church; and for that cause gave unto him 200 l. and thereupon procured the Lord Windsor to present the said Henry Fowler, who (as it was alledged) knew not of this Agreement; and he thereupon was admitted, instituted, and inducted. And this matter being disclosed in the Court of Wards, It was resolved and Decreed in the said Court by the advice of the Chief Justices, and the Chief Baron, that he was presented by Simony, and that by the Statute of 31 Eliz. it belonged to the King to present, without deprivation or removing of the Incumbent by Quare impedit. Whereupon the King presented the said Anthony Lamphorn, who was admitted, instituted, and inducted, and continued there for three years; and afterwards the said Richard Fowler the Father, Sued him before the High Commissioners for Misdemeanors, and procured him to be deprived; And before the Deprivation ten days, procured a grant of the next Avoidance to J. S. And after the Deprivation, within ten

(17)

St. 31 El. cap. 6.

1 Cr. 337.
Ante 385.

Co. Lit. 120. a.
Ante 385.
3 Cr. 789.
3 Inst. 154.

ten days procured the said J. S. to present the said Henry Fowler, who was again admitted, instituted, and inducted, and made this Lease to try the Title. And it was hereupon moved upon the Statute, that the Presentation of Henry Fowler is merely void, and he is a person disabled by the express words of the Statute ever to accept of that Benefice, and his admission and institution thereunto is merely void; and every one who is in possession hath good title against him and his Lessee, so as the Plaintiff cannot maintain this Action. And of that opinion was all the Court, and delivered the Law to be clearly so to the Jury: Whereupon the Plaintiff was non-suited.

Moor *versus* Blackwel.

- (18) **T**RESPASS: Clausum fregit, & alia enormia ei intulit; Upon Not guilty pleaded, and damages found to 400 l. in respect of the abuse of the Plaintiffs wife: It was moved in arrest of Judgment, that upon the return of the Ven. fac. there wanted these words, Quilibet Jurator. per plegios. So it is as if there had not been any return of this Writ. But the Court held, that it was not as a blank return where no return is at all, or that the Name of the Sheriff is omitted; But here is an insufficient return, which is aided by the Statute of *Jeofails*. And although no President can be shewn, where such returns have been amended, yet they said they would make a president thereof; for the omission of the pledges is but matter of Form, and not like to Doctor Husseys Case, where there was want of Pledges upon the Original; wherefore it was awarded to be amended. Another exception was taken, that a Juror was named Franciscus in the Ven. fac. and upon the Distringas, Francus, and so another person: Sed non allocatur; For they be both but one Name abbreviated; Wherefore it was adjudged for the Plaintiff.

Ante 414.

Ante 28.

The Bishop of Osaries Case in Ireland.

- (19) **J**UDGMENT was given in the Kings Bench in Ireland, and within two days after the Judgment given, the Defendant delivered to the Chief Justice a Writ of Error, purchased out of the Chancery in England, returnable in the Kings Bench in England: And whether they might award Execution notwithstanding, was the Question, because the Record it self remains with them, out of which they might award Execution, as they conceived; For that is not sent into the Kings Bench to England, but the Transcript only: And thereupon they deferred the Execution, and prayed the advice of the Justices of the Kings Bench in England. And by the Opinion of all the Justices, the Writ in Judgment of Law is a Superfedeas, although the Record it self

Ante 342.

self be not sent; For if Error be brought in Parliament upon a Judgment in this Court, the Transcript is only sent, and the Record remains in the Kings Bench, and yet the Court is foreclosed: So of Error in the Exchequer Chamber, the Transcript is only sent, and yet the Court is foreclosed, *Pendante placito in discusso*. Vide 5 Ed. 2. Tit. Error 89. 8 H. 5. 15 Ed. 3. Tit. Error 33. And Doderidge said, that the Record it self is not sent, because the Sea is betwixt England and Ireland; and if the Transcript should miscarry, they could again resort unto the Record; But if the Record should miscarry, the case is lost: And he said, that those of the Kings Bench in England might not award Execution; but upon a Judgment given, they should send a special Mandate to the Chief Justice of Ireland to do it. And they all resolved that the Writ of Error was a Superfedeas until the Error was examined, affirmed, or reversed.

Webb *versus* Cook.

Prohibition was prayed; For that Cook sued Webb in the Spiritual Court, for saying, That he had a Bastard: Webb the Defendant alledged in the Spiritual Court, that the Plaintiff was adjudged the reputed father of a Bastard by two Justices of the Peace, according to the Statute, whereupon he spake these words: And they of the Spiritual Court accepted his confession, but would not allow his justification; Wherefore he prayed a Prohibition, *Post. 625*; which was granted him. (19)

Jobbin's Case.

Prohibition was prayed to the Court of Requests, For that Jobbins Administratrix sues in that Court, complaining, that she had taken Administration of her Husbands goods, thinking that he was out of debt, unless for small sums which he owed to Labourers, &c. and that she had payed those debts, and other the like, and so administered the goods. And afterwards Actions of debt upon specialties were brought against her; whereupon she prayed an Injunction, and had it: And upon this matter shewn, a Prohibition was granted *per totam Curiam*. (20)

Termino

Termino Trinitatis,
Anno decimo septimo J A C O B I Regis
in Banco Regis.

Betts versus Trevaman.

(1)

Action for these words; Whereas he was a Scribener and Freeman of London, that the Defendant spake of him these words, Thou art a Rogue, a Cony-catching Rogue, a Cozening Rogue, a Cutpurse-Rogue: After Verdict for the Plaintiff, it was moved in arrest of Judgment, that these words were not actionable; for they do not touch him in his profession: And the first words, Thou art a Rogue, are but words of spleen, and no cause of action; and the words after rely upon the word Rogue, and are but additions and adjectives to the word: Wherefore the action lies not, and it was adjudged for the Defendant.

Ante 66, 514.

Gainford versus Tuke.

(2)

Action for these words, Thou wast in Launceston Goal for Coining; The Plaintiff replies, If I was there, I answered it well enough; yea, the said Defendant, you were burnt in the hand for it: Upon Not guilty pleaded, and Verdict for the Plaintiff, it was moved in arrest of Judgment, that these words be not actionable, for to say that one was in Gaol for Coining, no action lies; for it is no affirmation that he did Coin; and he doth not say, for false Coining: And the subsequent words, That he was burnt in the hand, shew that it cannot be for false Coining, and they be but idle words: But the Court resolved to the contrary, that these be malicious words, and shew his intent to accuse him for being imprisoned for Coining; and the subsequent words ex-aggravate, and diminish not the former; Wherefore it was adjudged that the action well lay.

Ante 331.

Ante 247.

John Ford versus Julian Ford.

(3)

Error to reverse a Judgment in Trespass in the Common Bench; The Error assigned was, because in the first Declaration there wanted these words, vi & armis: But the second Declaration which was after Imparllance, whereupon the Issue was joyned, and the Verdict given, was good and perfect: And it was moved by Bridgman, that the first was good enough; for the Writ is recited therein wherein is vi & armis: And the omission thereof

thereof in the Declaration is the default of the Clerk only, and therefore it shall be amended. But the second Declaration being good, the Verdict and Judgment thereupon are good, and not reversible: Sed non allocatur; For the omission of vi & armis, is matter of substance, which can never be amended: And the first Declaration being ill, which is the foundation, the second is but the recital thereof: And if the first be not good, the second will not help it; and therefore Houghton cited a former Judgment, viz. the case of the Bishop of Rochester, in Waste, where the first Declaration was not good, although the second were good, and Judgment thereupon, yet it was reversed. And 37 Eliz. Rot. 350. Sheen and Bridges case, where an Action of Battery was brought, and the Declaration was, Quod cum the Defendant did assault and beat him (without any affirmance of vi & armis) And the second Declaration was good, that the Defendant Insultum fecit, &c. Yet for this defect in the first Declaration, the Judgment was reversed: And so in 31 Eliz. betwixt Winch and Warner, Debt upon an Obligation, and declares upon an Obligation made primo Maii; And the second Declaration was upon an Obligation made secundo Maii, and the Obligation was shewn, &c. and upon Non est factum found for the Plaintiff, it was adjudged to be erroneous, because the first Declaration was not good, so here: And of that opinion was the whole Court; wherefore the Judgment was reversed.

Ante 443. 526.

Ante 498.

3 Cr. 507.

3 Cr. 416.

Bultivant *versus* Holman.

ERror of a Judgment in the Common Bench in a Writ of Covenant: The Error assigned, That the Declaration was not good; for it was upon an Indenture, which recites, Quod cum per Indenturam Testatum existit, that the said Bultivant infeoffed the Plaintiff of such Land, and therein covenanted to discharge and save him harmless from all former Dowers and Incumbrances; and shews, that one Fursse was seised in fee of that Land, before that Bultivant had any thing to do therein, and infeoffed Bultivant, who infeoffed Holman the Plaintiff: And that the wife of Fursse had brought a Writ of Dower against him, and had recovered, and so he had not performed the Covenant. Whereupon the Defendant demurred in the Common Bench, and there adjudged for the Plaintiff: And now assigned for Error, that it is not alledged by matter in fact that he infeoffed him, and that he was seised in fee by vertue thereof; But only Quod testatum existit, which is only by way of recital, and therefore not good: And in proof thereof he relied upon 21 Ed. 4. 49. and Dy. 139. But all the Court resolved to the contrary; and that the difference is, where it is by way of Declaration, and where it is by way of bar or replication; For in the Declaration, Testatum existit is sufficient to induce the Action, and to assign the breach; and the Judgment was affirmed.

(2)

3 Cr. 195.

Ante 383.

Miller *versus* Regem.

(5) **E**Rror of Judgment given in an Information in the Court of Guildhall before the Mayor of London: A question was made, whether it might be reformed here, or it ought to be by a special Commission in London, according to their Charter: But it was shewn, That this being matter concerning the Crown, a Certiorari was thereupon awarded to remove the Record; which being removed, a Writ of Error was brought, Coram vobis residet; and so be divers Presidents: And the Errors assigned were; first, because the Information was brought in London, upon the Statute of 5 Eliz. for exercising a Trade, whereto he was not bound Apprentice, and therefore demanded 40 s. for every month; and this being a Penal Law, ought not to be sued but in the Kings Courts at Westminster, where the Kings Attorney is to acknowledge or deny, as Co. lib. 6. fol. 19. and therefore is not suable there; and for that cause it was erroneous. Secondly, because the Judgment was, Quod esset in misericordia, where it should be Quod capiatur; Wherefore the Judgment was reversed.

Ante 85.
Ante 179.

Co. 8. 60. b.
2 Cr. 568.

Hyde *versus* Scyfflor, Pasch. 17 Jac. Rot. 157.

(6)

TRespass; for that the Defendant 21. Maii, 6 Jac. made an assault upon Elizabeth the Plaintiffs wife, Et illam verberavit, & male tractavit, Nec non the said Elizab. simul cum one Gown, one Peticoat, &c. of the goods of the Plaintiff, simul cum the said Elizabeth, apud D. tunc & ib. cepit, abduxit, & abcaravit, nec non eandem Elizabetham per 5. annos ab eodem le Plaintiff detinuit & custodivit, per quod le Plaintiff solamen & consortium, nec non consilium & auxilium in rebus domesticis quæ idem le Plaintiff habere debuisset & potuisset cum uxore sua per totum tempus præd. perdidit & amisit, & alia enormia, &c. The Defendant pleaded Not guilty, and found against him, and Damages found to 300 l. and Judgment found for the Plaintiff, and now Error thereof brought in the Exchequer-Chamber: The first Error assigned, was, because the action was by the Baron solely, for the battery of his Feme, which ought not to be; for the Tort and Damages are properly done to the Feme; and therefore the Baron sole without the Feme could not maintain this Action; and then the Damages being entirely given, the Judgment is erroneous. Vide 9 Ed. 4. 52. 46 Ed. 3. 3. 22 Aff. Pl. 16. ante fol. But all the Justices and Barons held, That true it is, the Baron for the battery of his Feme, ought to joyn his Feme with him in the action, if this had been brought for that cause; But here the action is not brought for the battery of his Feme, but for the loss and damage of the Baron, for want of her company and aid: And all is concluded with the per quod, &c. which extends to all that was before; as where
an

Ante 502.
1 Cr. 90.

an Action brought by the Master for the battery of his Servant, per quod servitium amisit, &c. A second Error assigned, was, because it is cepit & abduxit, where it ought to have been rapuit; For so is the Register for Writs brought in such cases: Sed non allocatur; For it may be both ways: wherefore the Judgment was affirmed.

Godfrey *versus* Dixon.

Cornelius Godfrey, an Alien of Spain, had Issue Daniel, born in Flanders, in Leigeancia Regis Hispaniæ; The Father and Son came into England in 4 Eliz. The Father is made a Denizen and after hath Issue Cornelius his younger Son, born here in England in 40 Eliz. the father dies, Et anno 3 Jac. Daniel is naturalized by Parliament, and after purchaseth Coppelhold-Land, and dies without Issue; And whether Cornelius the younger Son should inherit this Coppelhold, was the question: The words of the Naturalization are these, That Daniel shall be enabled to purchase, inherit, have and enjoy, and demand as heir to any Ancestor lineal or collateral; And that he shall be adjudged a natural Subject of the Kingdom of England, in every respect, condition and degree, to all intents, constructions, and purposes. The doubt only grew upon these words, because it is enacted, that he shall be heir to his Ancestor lineal or collateral: But it is not said, that they shall be heirs unto him. And it was objected, that at the time of the fathers death, the eldest Son had no inheritable blood in him, and in defect thereof, the youngest Son might not be heir unto him. But it was thereto answered, that true it is, there was a disability, but not in the blood, viz. his blood was not the cause of his disability, but the place of his birth; For the Law respects not the blood, where there is not any allegiance: But here is not any corruption of blood, or any half-blood; but it is, as if the eldest Brother had gone out of the way, 22 H. 6. Doct. & Student, if an Alien hath a son alien, and afterward the father is made a Denizen, and hath another son, here the second son shall inherit, although the eldest son be alive: In this case also, there needs not any blood from the father, because the land came not from the father: And to that purpose Holbies Case 41 Eliz. was cited; A father hath issue a son and daughter; the father is attainted and executed, the son purchaseth Lands, and dies without issue; Adjudged that the daughter shall inherit. And when it is said, that he shall be adjudged as a natural born Subject, the consequent is, that he shall have heirs to inherit him, both lineal and collateral; Relativorum cognito uno, cognoscitur & alterum: And it was without Argument adjudged for the Plaintiff, viz. that the younger son should inherit: and the chief Justice said, that naturalization is always by Parliament, and perpetual; For if one be naturalized for a day, it is good for ever: Denization is by Patent, and may be pro tempore, as for years, life, &c.

(7) 1 Vent. 428.

Co. Lit. 8. a]

Co. Lit. 8. a]

Co. Lit. 8. a]

Co. Lit. 129. a]

Warrens Case.

- (8) **W**arren being one of the Council of Coventry, was removed, and obtained a Writ of Restitution: And thereupon the Corporation returned, that they had a custom to Elect any to be of the Common Council, and to remove him ad libitum; And that Warren was removed, &c. And the Court held, that the return was good: And this difference taken, where a man is a Freeman or Alderman, &c. they cannot remove him from his freedom or place, without cause: And in such case such a custom is void, because the party hath a Freehold therein; But to be of Council, is a thing collateral to a Corporation; and then the Council surmised that he was an Alderman, and removed: whereupon a new Writ was issued to restore him to his Aldermanship. Vide 26 H. 8. 5.

Co. II. 98. b.

Termino

Termino Michaelis,

Anno decimo septimo JACOBI Regis
in Banco Regis.

Alfop *versus* Bowtrell.

Ejectione firmæ for Lands in Munden in the County of Hertford: The question was, upon evidence of the Jury, whether Edmund Andrews dying the 23. of March, Anno 1610. and A. his Feme being *privatement enseint*, but not delivered until 5. Jan. 1611. (which was forty weeks and nine days, and then delivered of a Daughter named Elizabeth) shall be reputed the Father to the said Elizabeth, or that she were a Bastard; For it was proved, that he fell sick upon the 22. day of March, and died the day following of the Plague: And that Edmund Andrews (Father of the said Edmund who was dead) in malice to his Sons wife, did much abuse her, and caused her to be dislodged from places where she was harboured, and to lie in the cold Streets; and that she was so used for six weeks together before her Travell; and she being brought into a Womans house, who commiserated her case, having warmth and sustenance, was delivered presently within twenty four hours of the said Elizabeth: And this being proved, and this misusage, by five women of good credit, and two Doctors of Physick, viz. Sir William Baddy, and Doctor Mundford, and one Chamberlaine (who was a Physician, and in nature of a Midwife) upon their Oath, they affirming that the child came in time convenient to be the Daughter of the party who died; And that the usual time for a Woman to go with child, was nine months and ten days, viz. menses Solares, that is, thirty days to the month, and not menses Lunares, and that by reason of the want of strength in the woman or the child, or by reason of ill usage, she might be a longer time, viz. to the end of ten months, or more; and so both ancient and modern Authors and Experience proves: The Court held here, that it might well be as the Physicians had affirmed, that ten months may be said properly to be the time mulieribus pariendo constitutum. Against this a Record was produced, Trin. 18 Ed. 1. Rot. 13. in this Court, That because a Feme went eleven months after the death of her husband, It was resolved, that the Issue was not legitimate, being born post ultimum tempus mulieribus pariendo constitutum. But note, it is not there shewn, what was ultimum tempus mulieribus pariendo constitutum. And the Physicians further affirmed, that a perfect Birth may be at seven months, according to the strength of the Mother, or of the child himself,

(1)
1 Roll. 356.

1 Roll. 356. 7.
Co. Lit. 123. b.

Ante 102.

1 Rol. 356.

himself, which is as long before the time of the proper birth; And by the same reason it may be as long deferred by accident, which is commonly occasioned by infirmities of the body, or passions of the mind: And so the Court delibered to the Jury, that the said Elizabeth who was born forty weeks and more after the death of the said Edmund Andrews, might well be the Daughter of the said Edmund: And in this case the Marriage betwixt them being at Utrick beyond Seas, and certified under the Seal of the Minister there, and of the said Colon, and that they cohabited for two years together as Man and Wife, was a sufficient proof that they were married. Vide 1 H. 6. 3. 21 Ed. 3. 9. 41 E. 3. 11. what shall be said to be the time mulieribus pariendo constitutum, see Sir Tho. Rydleys View of the Civil Law, fol. 55. where he relates of a widow in Paris, that was delivered of a child the fourteenth month after her Husbands death, and yet the Judges awarded the child to be legitimate. The like Judgment was given in the Consistory at Witenburgh, in case of a woman who was brought to bed in the eleventh month after her Husbands death. Vide Cornadi Manseri partem secundam de Matrimoniis, cap. 36. fol. 150. Selden de successionibus, fol. 22. Crokes Anatomy lib. 6. fol. 336.

Draycot *versus* Heaton, Hill 14 Jac. Rot. 771.

(2)

Ante 6.

Ante 528.

ERror of a Judgment in the Court of Derby, in Debt upon an Obligation, where the Defendant pleaded Non est factum, and found against him; The Judgment entred, was, Quod capiatur: But the Judgment certified was in this manner, Ideo in misericordia capiatur; and this was assigned for Error; And it was moved, that these words (in misericordia) were stricken out, and so the line under it shews; And the Judgment only is Capiatur; And to inform the Court, a Certiorari was awarded, which certified, that the words, in misericordia, were not in the Judgment, but a Capiatur only. And being now moved, the Court would not allow thereof, but said that a Certior. should not be awarded to an inferior Court, to certify that which the Record should certify: wherefore not having regard to that Certiorari (because the Record certified had those words (in misericordia) in it, and the line underneath is no defacing or drawing them out, and the Capiatur was with another hand) it was therefore reversed: And after that day such another Record out of Norwich was shewn, where the Plea was in Trespass upon the Case, and all the proceedings were Trespass, because it is not warranted by the plaint, yet (although the Steward was present, and shewed his Book of Entry of Plaints, that it was mispension) it might not be amended, but was reversed for this cause.

Richard

Richard Bourns Case.

One Richard Bourn was imprisoned at Dover by the Lord Warden of the Cinque-Ports, because he took Anchore and Cable as wreck, in the Liberty of the Rape of Hastings, which the Lord Warden pretended to be within the Cinque-Ports, and to appertain unto him, because he hath the jurisdiction of the Admiralty there: And he being for twenty three weeks imprisoned there, an Habeas corpus was granted to remove the body cum causa; and the Lord Warden of the Cinque-Ports would not obey it: Wherefore now in open Court an alias habeas corpus was prayed with a penalty, because the Lord Warden pretended that this Writ was not awardable to the Cinque-Ports, nor returnable by him; for he pretended that the Kings Writ ran not there: And a President was cited in this Court, 43 Eliz. that one Browley was committed in Barwick, and a Writ of Hab. corp. being awarded, the Mayor of Barwick would not obey it, because it was pretended, that the Kings Writ ran not there, for that it was part of Scotland, and no part of England; and was an exempted Jurisdiction after it was annexed to this Crown: But such pretences were disallowed, and an Attachment was awarded against the Mayor, and he was imprisoned and fined for his Contempt. Also Keeling the Secondary in the Crown-Office vouched a President, 22 Ed. 1. in the Erchequer, where Process out of the Erchequer for the Kings debt was awarded to one of the Cinque-Ports; and because they would not return the Writ, upon pretence of their Privilege, that the Kings Writ did not run there, they were fined 100 l. And 30 H. 6. 6. that the Kings Writ in particular cases may be granted to the Lord Warden of the Cinque-Ports. And Montague chief Justice said, that the Privilege of the Cinque-Ports, that the Kings Writ runs not there, is to be intended between party and party; But no such Privilege can be against the King: And this Writ is a Prerogative Writ, which concerns the Kings Justice to be administered to his Subjects; For the King ought to have an accompt, why any of his Subjects are imprisoned; and it is agreeable to all persons and places; and no answer can satisfie it, but to return the cause, with Paratum habeo corpus, &c. And this Writ hath been awarded out of this Court to Calice, and all other places within the Kingdom: And to dispute it, is not to dispute the Jurisdiction, but the Power of the King and his Court, which is not to be disputed; and of this opinion were all the other Justices: And Doderidge said, that he had oftentimes seen where an Alderman or any other Officer was displaced without cause, that a Writ of Restitution had been awarded hence to the Cinque-Ports; and that he remembered the Case of one Brierley, where it was

(3)

1 Cr. 252.

4 Inst. 1223.

1 Cr. 253. 264.

3 Cr. 911.

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so awarded : Wherefore they all held, that an Habeas corpus, with a great penalty, should be awarded, returnable at another day.

Heath versus Dauntley.

- (4) **E**Rror of a Judgment in the Exchequer-Chamber ; The Plaintiff declared, whereas he had sold unto the Defendant certain clothes for 370 l. one moiety of the money to be paid within fourteen days, and the other moiety to be paid at the end of three months; whereof the Defendant had paid the one moiety at the end of fourteen days : That the Defendant the twentieth of May, anno supradicto, in consideration that the Plaintiff would accept his Bill for 137 l. to be paid the first day of December following, assumed to pay the said 137 l. And alledgeth in fact, that he accepted his Bill for the said 137 l. and that he had not paid the said 137 l. nor the 48 l. residuum of the said moiety, but failed of the payment, contrary to his promise and Assumpsit. The Defendant pleaded Non assumpsit, and found against him, and entire damages was assessed, and Judgment given for the Plaintiff : And now Error thereof was brought in the Exchequer-Chamber ; The first Error assigned, was, because there is not any promise alledged but for the payment of the 137 l. And he hath alledged the breach to be aswell in the non-payment of the said 48 l. being the residue of the moiety, as for the non-payment of the 137 l. and Damages being given entirely for both ; there is not any promise for the payment of the said 48 l. Sed non allocatur ; For by the sale of the cloth for 370 l. the one moiety to be paid within fourteen days, the other to be paid within three months, there is therein an implied promise to pay those sums at that day : And then the breach in the non-payment of the said 137 l. according to the other promise, and the delivery of the 48 l. which is upon the promise before, is well enough assigned. Secondly, It was moved, that this Issue, Non assumpsit, generally is not good : For here being several promises, he ought to have traversed them severally : But all the Justices and Barons held, that Non assumpsit extended to several promises ; But Tanfield chief Baron said, that upon an Information betwixt Paramore and Robinson in the Kings Bench, where several contracts upon usury being alledged, Issue was joyned, whether it were corrupti agreatum modo & forma prout, It was resolved by all the Justices of England to be an ill Issue ; For he ought to have traversed the Agreements because they were several : Yet notwithstanding the Judgment was affirmed.

1 Cr. 219.

Sir George Reynell *versus* Langcastle, in the
Exchequer-Chamber.

ERror of a Judgment in the Kings Bench; Whereas Stephen (5)
Langcastle brought Debt as Executor to John Langcastle, in Hob. 264.
the Debet & detinet, where he himself recovered against Sir Ralph
Sydley the said debt, upon an Obligation made to the Testator,
and had him in Execution under the custody of the Defendant,
being Marshal of the Kings Bench; That the Defendant suffered
him to escape; per quod actio accrevit. Whereupon Issue was
joyned, Quod non permisit ire ad largum, and found for the Plain-
tiff, and Judgment given in the Kings Bench: Exceptions being
there taken to the Declaration, in stay of that Judgment, Error
was now assigned, because the Action was brought in the Debet &
detinet, where it ought to have been brought in the Detinet only;
For it is a duty due unto him as Executor, and in that right he
ought to demand it: And although it were upon a Recovery in
his own time, yet it was grounded upon an Obligation made to
the Testator: And although this Action is brought for an Escape
in his own time, yet being for a duty due to the Testator, he
ought to pursue the course of the first Action, and had no right to
demand it, but as a duty due to the Testator; and it shall be
Affect in his hand; and if he dies, the Administrator to the first
Testator shall have the Suit; Therefore it was resembled to the
Case of Auditors, assigned by an Executor, to accompt the Testa-
tors debts; Action of Debt upon this accompt shall be in the De- 3 Cr. 326.
tinet: And Co. 5. fol. 31. was cited to be so resolved, and the
Case of one Crogate against the Lady Gresham, where she sold
Land by Act of Parliament, for the payment of Sir Thomas 3 Cr. 326.
Greshams debts, yet the action was there brought in the Detinet.
And although it was here argued to the contrary by Noy, that it
was not Error; first, because it is a good Declaration, being in
an Action grounded upon a *Tort* done unto himself, and given by
a special Statute, and therefore to be brought in the Debet &
detinet; And for that purpose he vouched Bedells and Shermans
Case; where an Executor being Lessee for years of a Rectory in
right of the Testator, brought debt upon the Statute of 2 Ed. 6. in
the Debet & detinet, for not setting out of his Tythes; and ad-
judged good, because it was a personal wrong in his own time:
So if an Executor bring Trespass de bonis testatoris, and recovers
damages in debt upon this Judgment, it shall be in the Debet
& detinet. Secondly, He objected, that if it were not good by
course of Common Law, yet it was aided by the Statute of
18 Eliz. For it is not matter of substance, but of form only, he
being Plaintiff. Yet all the Justices and Barons (except Ju-
stice Hutton, who doubted thereof) resolved, that the Declara-
tion

tion was not good : And it is not matter of form only ; For although it was said, where an Executor is Plaintiff, the Judgment is all one ; but where he is Defendant, the Judgment is altered ; For then he shall be charged *de bonis propriis* : Yet in regard the demand is of a duty due to himself, and in his own right, and if he should recover, he should have it as a duty to himself, and not as due to the Testator ; and thereby alter the nature of the Action : It is therefore matter of substance, and not aided by the Statute, as it is resolved, Co. 5. fol. 35. in Playters Case, & *ibid.* fol. 36. in Walcot's Case : And there is not any difference where the Executor is Plaintiff, and where Defendant. And as to the first objection, they all resolved it ought to have been in the Detinet only ; For it is grounded upon the former Judgment : And as in an action of Debt brought upon the first Judgment, it shall be in the Detinet ; so shall it be here likewise : And is not like Bedels Case ; For that was merely a personal wrong, and grounded upon the Statute, which gives it to the party grieved only ; and which was never given for any cause or duty to the Testator, but for a Tort to the Executor : Wherefore they held, that it ought to be in the Detinet ; and the Judgment therefore was reversed. Vide 24 H. 6. 5. 11 H. 6. 8. 21 H. 6. 1. Tanfield chief Baron, &c. took this difference ; where the Action is grounded upon privy of Contract, it ought to be in the detinet, as 11 H. 6. 37. 11 H. 4. 56. 10 H. 7. 5. But otherwise it is, when it is grounded upon a Tort, as 41 Aff. 15. And it was then also further said, that an Executor can never have an action in the detinet, but where the Testator might have had the same Action. Note. That in the Argument of this Case, it was then delivered by the Court, that *Hargraves Case*, Co. 5. fol. 31. was afterwards reversed in the Exchequer-Chamber, in the point of *Debet & Detinet*, according to the Book of 10 H. 7. 5. But the Lord Riches Case was adjudged afterward in the Kings Bench according to *Hargraves Case* ; *Ideo quare legem inde* : And that *Hitchcots Case*, cited in *Hargraves*, was adjudged in this manner ; as appears by the Record in the Exchequer. *Hitchcot*, 36 Eliz. brought *Debt* against a Gaoler, for an escape of one in execution upon a recovery had by the Executor himself in the *Debet & Detinet* ; And being questioned there whether it were good or not, the Barons were divided in opinion ; the two *Puisney* Barons against the Action, and *Periam* Chief Baron for it : And so it continued afterward in 37 Eliz. when the Plaintiff brought a new Action in the *Detinet tantum* in the same Court, and thereupon had Judgment to recover.

Post. 685.
Co. 5. 31. b.

1 Cr. 226.
3 Cr. 712.
Ante 238.
Post. 549.
Hob. 264.

3 Cr. 327.

Ante 361.

Symonds *versus* Wallsh, in the Exchequer-Chamber.

JUDgment in an Action upon the Case was reversed in the Exchequer-Chamber; For that the Ven. fac. was awarded to the Coroners upon a surmise by the Plaintiff, that the Under-Sheriff was the Plaintiffs Cousin, and shews how. Et quia defendens hoc non dedicit, ideo it was awarded to the Coroners, where, by the law it is not any principal challenge; For the Sheriff himself might have executed the Writ: And although the Defendant hath confessed and admitted it, yet that is not any cause to award the Ven. fac. to the Coroners; and in proof thereof a Judgment was cited in the Common-Bench, where in an Ejectione firmæ betwixt the Lessee of Sir Edw. Kingston, and the Tenant of the Earl of Bridgewater, Challenge being taken to the Array, because the Sheriff was Cousin to the Lessor, and because he concluded not to the Favour, it was adjudged to be ill, and to be no principal Challenge. Wherefore here for this cause the Judgment was held erroneous, and not aided by the Statute.

(6)

Co. Lit. 158. a.

Ante 21.
Co. Lit. 156. a.
3 Cr. 581.

Salkeld *versus* the Lord William Howard.

ERROR of a Judgment in Cessavit by default; where in truth he was not summoned (as appeared upon examination in the writ of Deceit, upon which this Judgment was annulled;) But the writ of Error was brought before the writ of Deceit: And it was now assigned for Error, that he was not Tenant the day of the writ brought, nec unquam postea: And thereupon demurred, whether he might assign that for Error, the Judgment being given by default; For it was agreed, if he had appeared and pleaded, he should never have assigned it for Error. And it was moved, that he well might assign it for Error; For Non Tenure had been a good plea in the first Action, as appears 8 H. 6. 17. 21 Ed. 4. 25. Then, when Judgment is given against him by default, he may assign it for Error, being an Error in Fact, which he had not time to plead, as 36 Ed. 3. Error 82. & 18 Ed. 4. 29. 19 Aff. Pl. 8. Otherwise it would be mischievous unto him to be bound by this Judgment, when he had not time to plead: For if one be Tenant for life, &c. the reversion being only in him, and a recovery be had against him, if the Land comes to him after this recovery, he should be prejudiced, because he hath no remedy if the Veyers and Summoners be dead. Also as this Case is, although the Judgment be annihilated by the writ of Deceit, yet the Record being removed hither, if it should be affirmed, he should have execution here; And peradventure the Process out of the Common Bench cannot be stayed, and he should be at loss by this Judgment which was gained by falsehood; Therefore the

(7)
Hob. 218.

F. N. Br. 97. C.

Co. 8. 62. a.

1 Cr. 53.

Law allows him to assign it for Error. And of that opinion was Doderidge, who argued very strongly, that in regard the Judgment was given by default, and he had no time to plead it in the first Action, the first Judgment being obtained against him by falsehood, it is great reason he should be now admitted thereunto; and he relied upon the Books, 19 Aff. Pl. 7. & 8. & N. Brev. 22. C. That he who pleads Non Tenure may have a Writ of Error, but not he who disclaims. Houghton and Montague to the contrary, because if he were not Tenant, he had not any loss; and being returned and summoned, and not pleading, it was his folly not to appear, and plead thereto. And this Court cannot take consuance of this reversal by a Writ of Deceit. And as a man shall not have benefit of a Release, although he be returned seised in fee, if he doth not plead it: Or if he hath to plead Audita querela, as 48 Ed. 3. 20. & 21 Ed. 3. 18. So forasmuch as he is returned summoned, and doth not plead this Non Tenure, he shall not have advantage to assign it by Error. And N. Brev. fol. 22. is, That he who pleads Non Tenure shall have a Writ of Error: But he doth not say, that one may assign Non Tenure for Error: Croke Justice doubted whether he might not assign it for Error, for the mischief which otherwise might befall him; Wherefore they would advise: Afterwards the parties compounded.

Austen *versus* Bewley, Pasch. 17 Jac. Rot. 486.

(8)

1 Cr. 6. 31.

Post. 594.
Hob. 18.
Ante 397.

3 Cr. 210.
1 Cr. 53.

ERror of a Judgment given in Rochester in an Assumpsit, where the Plaintiff declared, That the Defendant being indebted unto him in fifteen pounds, in consideration the Plaintiff would give time unto him for the payment until the first day of Easter Term, promised to pay, &c. And alledgeth in fact, that he gave day for the payment, &c. and that he had not paid. Upon Non assumpsit pleaded, and found for the Plaintiff, and Judgment accordingly, Error was assigned, for that it was not shewn how the debt accrued; For it was said, that a general Indebitatus was not sufficient: But it was resolved, that generally Indebitatus is not sufficient where it is the ground of the action; as to say, whereas he was indebted unto him in such a sum, he promised to pay, There he ought to shew how he was indebted: But where it is but an inducement to the action, as it is here, In consideration that he should forbear the debt until such a day; (For that they agreed upon the debt, and so it is but a collateral promise) it is good enough without shewing how. Secondly, it was objected to be erroneous, because it was not shewn when Easter Term began: Sed non allocatur; For it is well known to the Court, and the action is conceived after the end of the Term: Wherefore the Judgment was affirmed.

Freeman

Freeman *versus* Executor of Freeman, Trin. 17 Jac.
Rot. 623.

SCire fac. to have Execution of Damages recovered in an Appeal: The Defendant pleaded, that after Judgment, the Testator sued Execution by a Scire fac. against the Bail, and had Judgment and Execution awarded against the Bail. And it was thereupon demurred, and adjudged to be no plea, because it is not shewn that he was satisfied by the Execution against the Bail. For otherwise without satisfaction, he may always charge the Principal. (9) Ante 320. 338.

Mawle *versus* Cacyffyr, Executrix of Matthew Randle,
Pasch. 17 Jac. Rot. 346.

DEbt for twenty pound in the debet & detinet, for rent reserved upon a Lease made to one Spaulding, who assigned the Lease to Matthew R. the Testator, whereby he entred and was possessed, and dying possessed, made the Defendant his Executrix; and for Rent incurred after his death the action was brought. The Defendant pleaded, that after the death of the Testator she relinquished the possession, and did not intermeddle therewith, and that she had fully administered all the Testators goods. Whereupon it was demurred; and it was first moved, whether this action may be brought in the debet & detinet for Rent incurred after the Testators death: And it was resolved that it might, according to the opinion in Hargraves Case, Coke 5. fol. 31. Secondly, whether by this Waiver of the Term and possession, she shall be discharged of the rent, so as she shall not be charged in her own right. And it was held, that she could not waive it, unless it had been specially alledged, that the Rent was greater than the value of the Land. And then peradventure by special pleading she should be discharged. Thirdly, it was held, that this plea was ill, because it is not said, *Quod ei nad riens en ses maines jour de brief nec unques postea*. And an Exception was taken to Declaration, because he shews, that the Lease was made to begin at Mich. virtute cujus, intravit & fuit possessionatus, but he doth not say, that he entred after Mich. and if he entred before, he is a Disseisor: Sed non allocatur; For being said virtute cujus, he entred and was possessed, it is necessarily to be intended, that he entred after Mich. Wherefore it was adjudged for the Plaintiff. (10) Ante 446. 338.

Sir Nicholas Hall *versus* Bonythan, Mich. 12 Jac.
Rot. 538.

ERror of a Judgment in debt in the Common Bench; where the Defendant pleaded in debt upon an Obligation, payment (11)

ment of 50 l. 14. Junii, 11 Jac. according to the condition of the Bond, the Plaintiff saith, Quod non solvit the foresaid 50 l. prædicto decimo quarto Augusti anno 11. prædicto quas ei ad eundem diem solvisse debuisset. Et hoc petit quod inquiretur per patriam, & prædictus defendens similiter. And Issue being joyned in this manner, the Verdict found, Quod non solvit prædicto 14. Junii, prout the Defendant alledged; and hereupon Judgment was given for the Plaintiff. And the Error assigned was, that there was not any Issue here joyned; For the Defendant pleading payment at one day, and the Plaintiff replying to another day, and concluding, Et hoc petit, &c. it is not to that which the Plaintiff concludes; and so there is not a Negative and an Affirmative, and without them no Issue can be joyned: And of that opinion was Houghton Justice, that there was not any Issue here joyned; and that it is not aided by the Statute of Issues mis-joyned. But Montague and Doderidge to the contrary, that this word (August) is void: And if it had been prædicto 14 die, without mentioning any month, it had been sufficient; therefore the addition of August is void; and compared it to the Case 20 H. 6. 25. Usque diem impetrationis billæ, Scilicet, which is contrary; yet it was good enough, and the Scilicet void. So in an Action upon the Case, *sur Trover* of goods, and that postea, viz. such a day, which was before the loss, &c. yet adjudged good, for the viz. is idle. And the Declaration, That it was not paid prædict. 14. Junii, according to the condition, hath made it good: wherefore the Judgment was affirmed; For it was said, that the word (August) was superfluous, and that prædict. 14 die without more had been sufficient. Dyer 305. & 241.

Ante 118.
Post. 586.

Ante 429.

Dance *versus* Ekden and Bucklock.

(12)
2 Rol. 596.

Co. Lit. 154. a.

Hob. 37.
1 Cr. 491.
2 Rol. 667.

TRespass: Ekden justifies the putting in of his Cattel as a Cophholder to the Lord Norris of his Mannor of D. for Common; and Issue upon the Prescription. Bucklock justifies as Tenant of Sir J. Fettiplace, who was a Freeholder in Dorchester, who claims Common appurtenant to his Freehold; and Issue upon that Prescription. And the Plaintiff surmising, that the Lord Norris was Lord of the Hundred of Dorchester, wherein all the Freeholders are his Tenants, and within his distress, prayed a Ven. fac. unto the next Will, which was W. in the Hundred of Ewden, which is the next Hundred: And the challenge not being denied, it was awarded accordingly, and tried at the Bar; and thereupon moved in arrest of Judgment, that it was a mis-trial; For quoad Bucklock Tenant of Sir J. Fettiplace, this is no challenge: wherefore there ought to have been several Ven. fac. But all the Court after several motions herein resolved, that the Trial was good; For there never shall be several Ven. fac. to try several Issues in

in one County: But to such several Issues in several Counties, it is otherwise. Wherefore it was adjudged for the Plaintiff.

Loader versus Thomas Samwel and three others.

T Respays; for the taking of his Beasts, and detaining them until a fine of 10 l. was paid; the taking was apud Harwell, Thomas Samwell pleaded Non culp. The other Defendants justify, because Harwell is within the Hundred of Harwell, and the Sheriffs Turn of the said Hundred; and that at such a Let within the Hundred, it was presented, that the Plaintiff ought to repair such an High way, and had not repaired it. Wherefore the pain of 10 l. was assessed upon him, to repair it before such a day: And it not being repaired, it was presented at the said day. And thereupon the said pain estreated, and so justifies. The Plaintiff replies, that the Bishop of Winton, was seised in fee of the Mannor of Harwell, and he and his Predecessors have had a Let of all the Inhabitants there; and traversed, that it was not within the Let of the Hundred. And they were thereupon at Issue, and found for the Plaintiff for both Issues by a Jury at the Bar. And upon the Evidence, the Defendant would have proved it to be inquirable in the Hundred, because the Jury of the private Let did not inquire and redress it: For it was said, that although there be private Leets, yet as to this purpose they are within the Let of the Hundred, to inquire of things omitted by them to be inquired, being publique Nuisances. To which the Court agreed: But here, as the Issue is joyned, the question is, Whether it be within the Hundred-Leet generally, and not for such particular purpose. But this ought to have been particularly pleaded, and shewn to the Court; And so they delivered it as the Law to the Jury; whereupon the Jury found for the Plaintiff. And it was now moved in arrest of Judgment, that being a thing which concerned the Sheriff and his interest, the Ven. fac. ought to have been awarded to the Coroners, and not to the Sheriff himself: Also that the Ven. fac. ought not to have been awarded from Harwell, but from the Hundred, or from the body of the County: Sed non allocatur; for being awarded to the Sheriff himself, when he himself was party, and not to the Coroner, that is no exception for the Sheriff, it being done for his advantage and favour: But peradventure the Plaintiff might well have taken that exception. Also Harwell is the place which is alledged by both parties, where the Let is; wherefore from that place the Venue shall be, and not from any other: wherefore it was adjudged for the Plaintiff.

(13)
Moor 893.
1 Roll. 543.

4 Inst. 261.
Post. 584.
1 Cr. 76.

F.N.Br.21.F.

Gryffyn *versus* Charls.

- (14) **E**rror of a Judgment in Ipswich in Assumpfit: Wherein the Plaintiff declared, That in consideration he would bring for him in his Ship forty two Hogheads of Wine from Bourdeaux to Ipswich, he would content and satisfie him for it. And alledgeth that he brought them accordingly: And that 42 l. was minus satis to satisfie him; and how he had required the payment of the 42 l. and he had not paid it. Upon this Declaration it was demurred, and adjudged for the Plaintiff. And now Serjeant Hitcham assigned for Error that this Declaration was not good; Because he saith, that 42 l. est minus satis to satisfie him, and doth not shew what will satisfie him: But all the Court held, that it was well enough; For minus satis is little enough, or not sufficient; yet when he shews, that he did not require more, that sufficeth: wherefore the Judgment was affirmed.

Post. 610.

Reuan O Brian and others *versus* John Knivan.

- (15) **E**rror of a Judgment in the Kings Bench in Ireland, in Ejectione firmæ, upon a Lease of Lands by the Bishop of Ossory, 2. Octob. 16 Jac. Upon Not guilty, a special Verdict was found, That this Land was parcel of the Possession of the said Bishoprick; and that 20. Octob. 6 Ed. 6. the King by his Letters under his Hand, and under his Privy-Signet, directed to Sir James Crofts Deputy, Tho. Lufack his Chancellour, and others his Council, signified, that he elected and appointed Jo. Bale to be Bishop of Ossory, requiring them to take such order for his placing and Installation, as by the Orders and Laws of Our Realm of Ireland is necessary. Afterwards the Deputy being removed, the Chancellour and two others being made Justices of Ireland, they (without any other warrant) made Letters of Commission under the Great Seal of Ireland, directed to the Arch-Bishop of Dublin in Ireland, in this manner: Edwardus, &c. J. Archiepisc. Dublin, &c. Salutem, &c. Scitis quod nos considerantes Episcopatum Ossory to be void, J. Bale juxta tenorem quarund. literarum consignamus, & per presentes in Episcopum Ossory eligimus, creamus & constituimus; vobisque præcipimus quatenus præmissa confirmetis, ipsumque in Episcopum Ossory investiri & consecrari faciatis, &c. And that accordingly he was consecrated. That 3. Feb. 7 Ed. 6. the King accepted his Fealty, and a Writ issued to the Escheator to receive his Temporalities: That afterwards in the life of the said John Bale, prim. Mariæ, by Letters Patents under the Great Seal of Ireland, directed to the Dean and Chapter of Kilkenny, signifying, that she had appointed and elected to that Bishoprick, being void, John Tonery; and

and appoint them to elect him, who was elected and returned accordingly, and had a Patent to be consecrated, and all things done for his consecration and restitution of his Temporalities, and otherwise, as was requisite to make him perfect Bishop. That he so being Bishop, entered into those Lands, and was seised, &c. prout lex, &c. and so seised in the life of the said John Bale, Anno 7 Eliz. let those Lands to Nicholas White for 101 years, which was confirmed by the Dean and Chapter; and that the said John Bale Anno 9 Eliz. died; and afterward John Tonery died, and Jonas Wheeler was duly elected Bishop, and entered upon the Defendant, being Assignee of Nicholas White, and Lessor to the Plaintiff, upon whom the Bishop re-entered, Et si, &c. And in Ireland Judgment was given by the opinion of the two *Puisne* Justices against the opinion of the Chief Justice there for the Plaintiff. And now the Errors assigned were in point of Law: And the first Question was, Whether Bale was well created Bishop? Secondly, admitting he were well created: Whether this Lease by Tonery, being Bishop de facto, but not de jure, in the life of the said John Bale (who never was deprived) being confirmed by the Dean and Chapter (he succeeding the said John Bale) be good against the Successor. First, it was objected, That Bale was never well created Bishop; because the Letter which was for his election was directed to Sir James Crofts the Deputy, and to the Chancellour and others; and it was not executed by the Deputy; For he was removed before execution thereof, and so not executed according to the Authority: And the Deputy being the principal person, and removed, all is determined. And it was compared to 38 H. 8. Dyer 62. where three Attorneys having authority, and two execute it, it is not good: Sed non allocatur; For it is not an authority, but as a commission of direction, which might be well executed, although the Deputy be removed. A second reason that Bale was never Bishop, was, because the direction was, That they should take order for his creation, and making him Bishop according to the Laws of Ireland, which ought to be by Writ of *Conge de Eslier*, which being returned, then a Patent should be made unto him under the Great Seal there; and then a Commission to consecrate him: And so is the Law and Use in England: And so was the Use and Law in Ireland until the Statute of 2 Eliz. made there, which gives Authority to the Queen, and her Successors to create Bishops by their Patent without *Conge de Eslier*; and so these circumstances shall not be observed, but an immediate creation by Patent: But it was resolved, That this Statute did not give unto her any new power; but it was only a restitution of the Common Law: And that the King here, and also in Ireland, before the said Statute, might create a Bishop by his Patent without any Writ of *Conge de Eslier*, which is but a form or ceremony which the Kings

Co. Lit. 181.b.

of this Realm have agreed to observe : But if they will not observe this course, it is well enough ; wherefore this creation before that Statute was good enough. Vide Nat. Br. 169. & 17 Ed. 3. 40. Another objection was, That here was not any Patent shewn of the creation, but only a Commission to the Arch-bishop of Dublin and others, to consecrate him : Sed non allocatur ; For therein are words, per presentes eligimus, creamus & constituimus, which is a sufficient Patent of creation, without any other Patent. A third objection was, that although John Bale were Bishop, yet he relinquishing the place, and the said Thomas being by legal Ceremony created Bishop, and having his Temporalities restored unto him, was Bishop in fact : And this Lease being made by him, and confirmed by the Dean and Chapter (especially he being Bishop in fact, and surviving the said Bale) the Lease should be good, and should bind the Successor : But it was resolved, that he not being lawful Bishop, this Lease to charge the possessions of the Bishoprick was void ; although all judicial Acts made by him, as Admissions, Institutions, Certificates, and such like, shall be good ; but not such voluntary Acts as tend to the depauperation of the Successor : Wherefore the first Judgment was affirmed.

Skelliton *versus* Hay, Hill 15 Jac. Rot. 456.

- (16) **E**jectione firmæ : Upon a special Verdict the Case was, That the Bishop of Worcester made a Lease to Sir William Whoorwood, for the life of him and two of his Sons ; He let that Land to John Mallet at will, rendering Rent, and after died ; Mallet the Lessee holds himself in, but mentions not how he claims, as Occupant or otherwise : William Whoorwood (one of the Sons of Sir William Whoorwood) being one of the *cestui que vie*, enters as Occupant, and let it to the Plaintiff, and the Defendant by the command of Mallet the Lessee ousted him : And whether Mallet were the Occupant, without claiming it as Occupant, or whether the other may enter by occupancy, was the question ; And it was adjudged for the Defendant, that the Lessee was Occupant ; For he being in possession, the Law casts the Freehold upon him, unless he waves it : And it is not requisite that he claim as Occupant : unless there be a disclaimer in it ; For being for his advantage, the Law shall adjudge it in him as Occupant : Wherefore it was adjudged for the Defendant.

Ante 200.

Wallis his Case.

Wallis a Burges of Ipswich, was committed to prison, and upon an Habeas Corpus, the cause was returned; That the said Town was an ancient Mill, and that therein was a custom to elect every year two of the Burgeses, who are called who used to make a feast upon such a day; and that the Defendant being elected, refused to make that feast; wherefore he was fined to twenty pounds, and imprisoned until he paid the Fine. And this was allowed to be a good custom, and well returned: wherefore the Prisoner was remanded. (17)

William Brent *versus* Haddon.

For that he was seised in fee of two acres of Meadow in Derby, and John Quarles was seised in fee of a Water-Mill in D. whereto the water ran out of the River of Sore by the said two acres; And that the said John Quarles erected ripas stagni molendini prael. so high, that by the exaltation of the water it overflowed the said two acres of Meadow, and yet overflows them; and that he afterwards let it to Haddon. After Verdict, upon Not guilty pleaded, and found for the Plaintiff, it was moved in arrest of Judgment; First, that there was no place mentioned where stagnum molendini should be, and there the nuisance is done; and it may be in another Mill: Sed non allocatur; For it shall be intended in the same Mill where the Mill is. Secondly, it was alleged, that the request to abate it was made to the Lessee, where it ought to have been to the Lessor, who had the Freehold; For the Lessee hath not any authority to abate it, being done in the time of his Lessor; and it should be waste in him; Nor was it any nuisance erected by him: Sed non allocatur; For the continuance is a nuisance by him, against whom the action well lies. Wherefore it was adjudged for the Plaintiff. Post. 557. Ante 373.

Trespas for breaking his house, and breaking three doors, and breaking and carrying away three locks of those doors. The Defendant justifies the entry into the house by virtue of a Fieri fac. awarded against the Plaintiff, directed to the Sheriff of and he being Under-Sheriff, and the other Defendants his Bayliffs, two of the Defendants entered into the house, and the door being open, took the goods, and the Plaintiff

B b b 2

Hob. 62.
Co. 5. 92. b.

Plaintiff shut the doors upon the Bayliffs, and imprisoned them for two hours; wherefore he brake open the doors and the locks to rescue his Bayliffs; *Quæ est eadem transgressio*: And it was thereupon demurred, and all the Court held, that although a Sheriff cannot break open an house being to take Execution by a *Fieri facias*, yet when the door is open, that he enters, and be disturbed in his Execution by the parties who are within the house, he may break the house to rescue his Bayliffs, and to take Execution. Wherefore it was adjudged for the Defendants: And in regard this restraining of the Execution, and detaining of the Bayliffs was confessed by the Demurrer, an Attachment for the good behaviour was awarded against the Plaintiff.

Chiberton versus Trudgeon.

(20) Debt brought by Chiberton Administrator, and Judgment thereupon; and now moved in arrest thereof, that this action was brought by an Administrator, who shews, that Administration was committed unto him by the Arch-Deacon; But shews not what Authority the Arch-Deacon had to commit Administration; and in proof thereof 21 H. 6. 23. and 35 H. 6. 46. were cited. And the difference is where Administration is committed by the Bishop or Metropolitan, and where by one who hath a peculiar Jurisdiction; For in the last Case, he ought to shew how he hath his power, Plow. 297. And although it be after *Aeridia*, yet it is not holpen by the Statute of 18 El. cap. 14. being matter of substance and not of form, as it was adjudged in *Cutts and Bennets Case*. But the Court held that it was well enough; and they said, that the Books which are of Peculiars, are good Law; For it cannot be intended they have any Authority, unless it be shewn: But the Arch-Deacon is *Oculus Episcopi*: And de *Jure Ordinario*, he is to commit Administration: And it was adjudged for the Plaintiff.

3 Cr. 791.

Ante 409.

3 Cr. 6.

Termino Hillarii,

Anno decimo septimo JACOBI Regis
in Banco Regis.

Memorandum, Upon the 23. Jan. Ann. 17 Jac. being Sunday, (1)
Sir John Croke, one of the Justices of the Kings Bench,
died at his house in Holborn.

Henry Bressley *versus* Thomas Humphreys, as Assignee
of William Charnet, Assignee of Ralph Masters,
Trin. 17 Jac. Rot. 561.

Covenant: For that he left to Ralph Masters, quoddam molen- (2)
dinum aquaticum in parochia de Swepton, & omnia, domus,
ædificia, aquas, aquarum cursus, ripas, Angl. Dams dicto molendino
adjacent. spectant. & pertinent. for twenty one years: And he cove-
nanted to repair the houses of the said Mill, the flood-gates,
Sewers, and the Dams, as also to scour the Mill-dam, Water-
course, and banks to the same Mill belonging, and to leave them
at the end of the term sufficiently repaired, &c. and four Mill-
stones. The breach was assigned for not repairing of the Mill and
Mill-banks, and for not leaving the Mill-stones; and exception
was taken, because he did not shew in what Mill the Mill-banks
were, 46 Ed. 3. 8. Sed non allocatur; For they shall be intended Ante 555;
to be in the same Mill where the Mill is. Secondly, Because it is
not shewn whether it were a Corn-Mill, or a Fulling-Mill: Sed
non allocatur; For all is one, the breach being assigned in the not Co. 4. 27. 2i
repairing, &c. It was also moved, that there were three breaches
assigned: And the Defendant having demurred upon the whole
Declaration, the Plaintiff ought to have Judgment without questi-
on for them wherein the breach was well assigned: And of that
opinion was all the Court; For they are as several actions; and
they held that they were all here well assigned: Wherefore it was
adjudged for the Plaintiff.

Sir Miles Fleetwood *versus* Curle, Auditor of the
Court of Wards.

Action upon the Case: Whereas he was a Justice of Peace, (3)
and by Patent was Receiver of the Court of Wards, and Godb. 341.
by reason thereof received great Sums of money for the King, Hob. 267.
and was used with much confidence by the King; That the De-
fendant, præmissorum non ignarus, having speeches concerning
him with one Tho. Whorewood, spake these words, Mr. Deceiver
(innuendo the Plaintiff) hath deceived the King, and I have him
in

Hob. 268.

in question for it (innuendo a supposed material thing by him against the Plaintiff) and I doubt not to prove it. The Defendant pleaded Not guilty, and found against him, and Damages assessed to four hundred marks, and Judgment given in the Common Bench for the Plaintiff: and now Error thereof brought and assigned, that these words (as they are alledged) are not actionable; For it is not alledged, that there was any communication of him concerning his Office, or his dealing in his Office, or that Whorewood knew that he was Receiver, or that the matter in question was any thing touching his Office; and then it shall not be intended to concern him in his Office, and so no loss or discredit unto him thereby: And it may be intended, that he deceived him in purchasing of Lands upon false considerations, or otherwise, and not in point of his Office. But all the Court held, that the Action well lay, being spoken of him being an Officer: and in that manner it shall be intended concerning his Office. And for the first words, Mr. Deceiver, it is an ironical allusion and nick-name to his Office and place, and therefore the innuendo is well applied; and if such crafty evasions should be admitted, it would be an usual practice to slander *sans* punishment: And when he said he had deceived the King, it is to be understood in his Office, as in that, wherein it is manifest he may deceive him, and not to take it upon foreign intentment; and it is good enough without any innuendo: Wherefore the Judgment was affirmed.

Edmund Watkins *versus* Oliver, in the Exchequer-Chamber, Pasch. 15 Jac. Rot. 374.

Post. 640.

Co. Lit. 3. a.

3 Cr. 897.

(4) **E**RROr of a Judgment in the Kings Bench: The Error assigned was; For that the Plaintiff declared in Debt against Edmund Watkins alias Edward Watkins, that he by the name of Edmund was obliged in an Obligation of 100 l. and for non-payment, the action was brought; The condition was, that if Roger Watkins paid 50 l. to the Plaintiff at such a day, That then, &c. The Defendant pleaded payment by Roger Watkins at the day and place, and Issue thereupon, and found for the Plaintiff, and Judgment for him: And now Error thereof brought, for that Edward Watkins is obliged, and Edmund is sued, which cannot be intended one and the same person: And no averment can help it; for one cannot have two Christian names; and there cannot be any estoppel as this case is: And of that opinion were all the Justices and Barons. But if the condition had been, If Edward Watkins paid the 50 l. &c. and the Issue had been, that the said Edward Watkins payed, and the Verdict had found for the Plaintiff, then the Verdict should make it an Estoppel, and the Court should be ascertained that they were one and the same person: But as it is here, a stranger paying the Sum, which is so found, it cannot help the Plaintiff: Wherefore

fore for this cause the Judgment was reversed. Vide Dyer 279.
1 H. 7. 29. Postea 640.

Pymmock versus Hilder.

Ejection firmæ: The Defendant pleaded, that the Land was ⁽⁵⁾
ancient Demesne, and pleadable by a Writ of Right-close, &c.
The Plaintiff shews, that they were Copphold Lands, parcel of ^{Co. 5. 105. a.}
the Mannor, and entitles himself by Lease under the Coppholder,
and traverseth that they were impleadable by a writ of Right-close:
And it was thereupon demurred; First, because Copphold Land
parcel of a Mannor of *ancient Demesne* should be pleadable there,
and not at the Common Law. Secondly, because this Traverse,
that they were impleadable, is but the consequence of *ancient De-*
mesne, and therefore not traversable: Sed non allocatur; For it
was resolved, that Copphold Lands are as the *Demesnes* of the
Mannor, and are the Lords Fræhold, and therefore not implead- ^{No. 63. 2.}
able but in the Lords Court; and that the Traverse was well
enough taken: Wherefore it was adjudged for the Plaintiff.

Porter versus Bathurst.

Prohibition: Upon a special Verdict the Issue was, Whether ⁽⁶⁾
an Abbey held such lands discharged Tempore dissolutionis,
&c. And it was found, that the Abbey was of the Order of the ^{Ante 454.}
Cisterians, who held them discharged of Tythes dum propriis
manibus excolebant; and that those lands were parcel of the
Demesnes: But in lease for years at the time of the dissolution, ^{Ante 453.}
and for certain years before, and now the years were determined,
The question was, whether the Owner should hold them discharged
in suis propriis manibus; and it was adjudged that he should;
For although the Farmer paid Tythes at the time of dissolution, ^{Co. 2. 43. a.}
yet quoad the Abbot, the Inheritance was discharged of Tythes; ^{Co. 11. 14. b.}
and the King, or his Patentee, shall have and hold it discharged,
as the Abbot held it for the Inheritance: Wherefore without ar-
gument on the Defendants part, none being there to defend it, it
was adjudged for the Plaintiff. Vide Dyer 277.

Lea versus Luthell, Trin. 16 Jac. Rot. 1367.

Debt upon an Obligation of 300 l. conditioned, to perform ⁽⁷⁾
the Covenants in an Indenture of the same date; the first
was, That he should marry Susan, Daughter to the Plaintiff, be-
fore such a day. Secondly, That Sir Edward Stradling and his
Feme should levy a Fine of such land to the Defendant, and
to the said Daughter of the Plaintiff, and to the heirs of their
bodies,

bodies. Thirdly, that the inheritance of the premises should remain in the said Sir Edward Stradling, or himself, until the fine levied. Fourthly, whereas he had granted a Lease for years, of part of Marshwood, to the said Susan the Plaintiffs daughter, that he had not made any former Grant, nor would afterwards make any Grant thereof, without the Plaintiffs assent: The Defendant quoad the last Covenant in the negative, pleaded, that he had not made any former Grant of the Lease, nor had made any Grant after the Obligation, without the Plaintiffs assent; Et quoad omnes alias conventiones, that he had performed them. Upon this plea the Plaintiff demurred; first, because the Covenant to levy a fine, &c. is an act to be performed by a stranger, and it is an act to be performed on Record; in both which cases he ought to plead, and shew how he performed it: And it is not sufficient to plead general performance; for acts of Record ought to be shewn specially; and the answer to them is *Nul tiel Record*, and no other Issue can be taken. Vide 2 H.7. 15. 10 H.7. 10. 13 H.7. 1. 5 Ed.4. 8. 21 Ed.4. 75. Dy. 56. A second objection was, because the Covenant being in the disjunctive, he ought to shew specially which of them, and not generally. Vide Co. lib.8. fol. 133. b. Turners Case, and 16 H.7. 11. Thirdly, he pleaded, that he did not grant without the Plaintiffs assent, which is *Negativa pregnans*, and therefore not good. Vid. 14 Ed.3. 5. 12 Ed.4. 4. And of this opinion was all the Court, that for these causes the Plea was not good: wherefore it was adjudged for the Plaintiff, upon the first Argument, especially for the first cause.

Co. Lit. 303. b.

Hob. 295.

1 Cr. 422.

3 Cr. 232. 3.

Ante 87.

Ive *versus* Chester.

(8)

A Sumpsit by William Ive and his wife, Executrix of Anthony Hornby, against Edward Chester; For that the Defendant in consideration the Testator would buy, and pay, for the Defendant these wares, viz. twenty four yards of lace, eleven yards of velvet, three yards of broad-cloth, and would make for him a cloak, promised not only to pay unto him such sums as he should expend for the said wares, but would pay unto him as much as he deserved for making the said cloak: And alledgeth in fact, that he bought the said wares, and laid out for them 21 l. And that he made the said cloak, and deserved for making thereof six shillings: wherefore for the non-payment he brought the Action. 2. That the Defendant was indebted to the Testator in 27 l. for a doublet and a pair of hose of velvet, made for him, and delivered by the Testator, and promised payment, and had not paid it; for which he brought the Action. The Defendant pleaded, that at the time of these several promises he was within age: Whereupon the Plaintiff demurred, and after argument at the Bar, it was adjudged for the Defendant; In regard it doth not appear, that this cloak, doublet, and

Post. 619.

and hose were for himself ; Nor if it had been averred they were for himself, for his own wearing , yet it not being averred that they were necessary and convenient for him to wear, according to his Estate and Degree ; Therefore this promise shall not bind him, and so the Action not maintainable. Vide 16 Ed.4.2. 21 H. 6. 31. 10 H.6. 14. and Machworth and Bachellays Case, and Stone and Withypoles Case. 3 Cr. 583.
3 Cr. 126.

Pigot versus Rogers.

ERror of a Judgment in the Kings Bench, in an Action upon the Case brought against Pigot, late Sheriff of the County of Salop ; Whereas upon 29. August, 13 Jac. one Edward Doughty was obliged to the said Rogers in an obligation of 200 l. that he, postea, viz. 29. Junii, 13 Jac. sued a Latitat against the said Doughty, with intent to procure him to be arrested to recover the said Debt, which was directed to the Sheriff of the County of Salop to execute, who sent his Warrant to the Bayliffs of Shrewsbury (who had the execution of Writs) to arrest him, and take Bond for his appearance, who returned unto him, that they had executed the Writ ; That the said Sheriff had falsely returned at the day a Non est inventus, whereby he was defrauded of his debt. The Defendant pleaded Not guilty, and found against him, and damages assessed to one hundred and fifty pounds, and Judgment : And Error brought and assigned, that the Declaration was not good ; First, because it is shewn, that the Obligation was made 29. Aug. 13 Jac. and he shews that the Latitat was sued out postea, viz. 29. Junii, 13 Jac. which was before the Bond made : Sed non allocatur ; For although the Process be before the Bond, yet being returnable in Michaelmas Term, and the Latitat upon that, after the Bond, it is sufficient to maintain the Action : And the Process always bears Teste the last day of the Term before. Secondly, It was alledged, that the Declaration was not good, because he doth not shew, that the Bayliffs delivered the Bond to the Sheriff which they had taken for appearance ; Nor is it shewn, that the Defendant did not appear, or had lurked in places unknown, whereby he lost his debt : Sed non allocatur ; For they serve but for aggravation of damages, and are by the Verdict supplied ; Wherefore the Judgment was affirmed. (9)

Ante 70.204.

Ante 533.

Johnson *versus* Leman, Trin. 17 Jac. Rot.

(10)

Action upon the Case for words: Whereas he was of good name and fame, and for twenty years before was, and yet is, a Citizen of London, and of the Company of Vintners, and during all the said time was a Merchant of Wines; And whereas John Buxton and Robert Holden brought an Action upon the Case against the said Johnson now Plaintiff, upon a promise, supposing that in consideration of 50 l. he promised to deliver unto him before such a day, two hogheads of Vinegar, and that he had not delivered them: Where, upon Non assumpsit pleaded, the Issue was to be tried by Nisi prius at Guildhall in London such a day, at which trial he intended to be present. The Defendant knowing the premises, and intending to scandalize him, and to procure his Neighbours to forbear Traffique with him, 11 Junii, 17 Jac. having communication with one Thomas Boulton of the Plaintiff, and of the said Trial then to be had, said in the presence of divers, Will you be at the Trial betwixt Master Buxton and Johnson? (innuendo the said Trial;) whereto he answered, I cannot tell: Whereupon the Defendant used these scandalous words of the Plaintiff, *William Johnson* is broken, (innuendo, he is not able to pay for the Wares he hath bought,) and I warrant you he dares not be at the Trial at Guild-Hall; Ubi revera he intended to be, and was at the trial, and was well able to satisfie all his debts; Quorum præmissorum prætextu, &c. Upon this the Defendant pleaded Not guilty, and found against him, and damages assessed to 200 l. And after Verdict, it was moved in arrest of Judgment, that these words be not actionable; For he doth not say, that he was broken in Estate, and it may be he was broken in body: And the words be not, that he dare not be there for fear of any arrest; but it may be, he dare not be there, by reason of thursting, or some other cause. Also there was not any trial betwixt Buxton and him, but betwixt Buxton and Holden, Plaintiffs, and him: Sed non allocatur; For it is all one in common parlance, with betwixt Buxton and Holden and him, and is well intended what he meant thereby: And for the words, He is broken, are common and vulgar words of one who fails in his credit, and becomes a Bankrupt, and so are commonly taken: Therefore they are taken in the worst sense; and so the Court shall intend them. But because the Damages were great, they should advise; and both parties referred themselves to the Lord Chief Justice, who ordered and awarded, that the Defendant should pay 66 l. 13 s. 4 d. and the Plaintiff should release.

Greenwood *versus* Tyber, Trin. 17 Jac. Rot. 1179.
Trin. 16 Jac. Rot. 1089.

Ejectione firmæ for lands in D. Upon a special Verdict the Case was, Arthur Long and Alice his wife, in right of the said Alice, being seised of this land in fee, by Indenture dated 20. Aug. 2 Ed. 6. betwixt them and John Fisher, let that land to the said John Fisher and Anne his wife, and Joan their daughter, habendum to them, ut supradictum est, & eorum diutius viventi successive, from Michaelmas following for term of their lives, rendyng annually during their lives, ut supradictum est, 13 s. 4 d. at the two usual Feasts, and an Hariot after the death of every of them: And after Michaelmas, Long and his wife made Livery to the said John Fisher and his daughter, according to the said Indenture. Afterwards Long died, and Alice his wife accepted the Rent from John Fisher: Afterward John Fisher died seised, and Anne his wife entred, and died seised; Joan entred, Alice entred upon her, and let to the Defendant: Joan takes husband, they enter, and let to the Plaintiff, Et si, &c. The first question was, whether this Lease Habendum from Mich. for thre lives, and Livery made after Mich. secundum formam Chartæ, be good or not, in respect the limitation is of a Freehold, to begin at a future time, and no Livery made till after Michaelmas. And as to that point it was resolved, that it is good enough; For the difference is where the Livery is made by the Lessor in person, and where by Letter of Attorney, being in the same Charter generally made: But if the Letter of Attorney be, to make Livery after Mich. then in both cases it is good enough; For there is not any intention that the Livery should operate futurely, but that livery shall be made when it should operate, and the Estate should be good presently: And therefore it differs from the Case, Co. lib. 2. fol. 55. Bucklers and Harris Case, where a Reversion was granted, Habendum after Mich. for life; Although the Attornment be after Michaelmas, yet being an act of a stranger, it shall not make that good which otherwise would be void: But here when the Lessor himself makes the livery after Michaelmas, it is well enough. Secondly, Admitting such a lease be well made by a Feme seised in fee in her own right, Whether such a lease made by Baron and Feme of lands whereof he is seised in right of his Wife, can be good against the Feme to bind her, although she accept the Rent, unless it be by Deed, as it is held in 26 H. 8. Dyer 2. & 91. that Deed being void, and this lease working by the Livery only (as it was objected that it should do) whether this lease be good: And it was resolved it should; For it was held, that the Livery alone did not make the lease, but the Livery and Deed; and it took its operation by both: And although if Livery had been made before Michaelmas,

(11)
Hob. 314.

1 Cr. 163.
Post. 617.

1 Cr. 94. 388.
Co. 5. 94. b.
Ante 153. 458.
3 Cr. 585.
Hob. 314.

1 Cr. 95. 42

it had ben void to make it a good Lease; yet being made after Michaelmas, it is made a good Lease by the Dæd and Livery, and not by any of them solely; For the Livery in this case is but the execution of the Dæd, and is a sufficient witness of their agreement; Which is the cause that it ought to be by Dæd, to prove the agreement of the *Feme*, and all Reservations, Covenants, and Warranties comprised in the Deed are good, and the Lessors and Lessors bound by them, and the Lease good, notwithstanding this Objection. The third and principal question was, in regard this Indenture is made between Anthony Long and Alice his Wife, on the one part, and John Fisher on the other part; and the Demise is made to John Fisher and Anne his wife, and to Joan their daughter. ut supradictum est, Joan and Anne not being parties to the Indenture, whether it were a good Lease to Anne and Joan, by way of remainder, the one after the other, or not; For otherwise as Joynt-tenants, it was agreed clearly by all, that they did not take, not being parties to the Indenture. And as to this point it was resolved by the Court, that they should take by way of Remainder, the one after the other, and as if the clause had ben in the Dæd Sicut nominantur in charta, as Dyer 361. For if they should not take that way, the Dæd should be void unto them, which the Law will not permit, if by any means or construction it can be made good. And by this construction, that the Husband first shall have it, and afterwards the *Feme*, and afterwards the daughter, by this reason the daughter cannot have it during the life of her Parents, nor the *Feme* during the life of the *Baron*; So thereby every part of the Dæd shall stand and be good enough: And this is enforced by the words, Ut supradictum est; which is, as if they had been named. Vide 18 Ed. 3. 39. 39 Aff. Pl. 20. And it was held, that this Case differed from the Case, Trin. 27 Eliz. Rot. 850. betwixt Wiseman and Hobert in the Kings Bench, where the Lord S. by Indenture betwixt him and William Wiseman the Father, let unto William Wiseman Habend. to him and R. W. and J. W. his Sons, for their lives, successive diutius viventibus; It was adjudged, that they should not take immediately, because they were not parties to the Deed, nor should take by remainder, to begin to them in the Habend. as Joynt-tenants immediately; and when they may not take that way, they shall not take any way. Also it appears not which of the Brothers should take, the one before the other: But in this case it appears, that the first part of the Deed shews, they all shall take, and not the Habendum only. Also the limitation, ut supradictum est, sheweth, that he intended such one after the other: Also the reversion of the Rent and Parlot, ut supradictum est, shews that the one after the other shall pay the Rent and Parlot: Also the limitation is, Et eorum diutius vivent. successive, & vivent. successive, for term of their lives: So the Successive

Hob. 314.
Moor 26.

Hob. 314.

3 Cr. 58.
Hob. 313.

cessive is before the limitation for all their lives : And in the other case the limitation is to them for term of their lives ; and then the Successive doth not divide it ; Wherefore it much differs from the said Case : And it was adjudged, that this Case was good by way of remainder, and that therefore the Plaintiff should recover. But a Writ of Error was presently hereupon brought in the Exchequer-Chamber ; and this being argued there before the Justices and Barons of the Exchequer, they seemed to doubt especially of the third point : Wherefore they moved the parties to compound ; and afterwards the matter was finished by the composition, and nothing done more therein.

Hob. 315.

E

Termo

Termino Paschæ,

Anno decimo octavo JACOBI Regis

in Banco Regis.

Coriton *versus* Thomas, Hill. 15 Jac. Rot. 2029. in
Com. Banco.

- (1) **E**Rror of a Judgment in the Common Bench in Debt by Thomas; Whereas before he had brought Debt for 40 l. against J.S. and had Judgment to recover the debt against him, and had taken forth an Elegit; That the Defendant being Sheriff, returned thereupon, That he had by such a Jury appraised such goods in specie to the value of 40 l. and had extended such lands; which goods and lands he delivered to the said Thomas the Plaintiff, ubi revera he never delivered them to the Plaintiff; per quod actio accrevit to demand that 40 l. &c. The Defendant pleaded Non debet, and found against him, and Judgment for the Plaintiff, and Error assigned, because no Action of Debt lies in this Case; For it is not any debt in the hands of the Sheriff, nor is there any cause to maintain this Action; for if he had not delivered the goods, he should have his Action upon the Case for his false return. And Henden Serjeant cited a Judgment in the Common Bench, where in the Case of one Pike, anno 14 Jac. the Sheriff upon a Scire fac. returned, that he had sold the goods for so much money, which he had delivered to the Plaintiff; and the Plaintiff thereupon averring that he had not the money, maintained an Action of Debt. But the Court held, that this differs from the Case in question, because there the Sheriff by his return confessed he had sold the goods, and delivered the money: But here it is not returned, that he medled with the goods, or with the value of them, so as there is not any certainty to charge him: Wherefore the Judgment was reversed.

Hob. 206.
Ante 515.

Anonymus.

- (2) **U**Pon an Excommunicato capiendo, the Plaintiff pleaded the Statute of 5 Eliz. And because he was not delivered by

by the Sheriff into the Kings Bench: being taken upon the Capias, he was therefore discharged, and a President shewn, that in 39 Eliz. 1 Cr. 583. upon such plea pleaded, the party was discharged; For it was said, that they ought to pursue the precise form, that the Writ should be brought and delivered openly in Court; Otherwise it is void, and not warranted by the Statute.

Eastcourt *versus* Cope, Hill 17 Jac. Rot. 941.

DEbt for 127 l. reciting, whereas he recovered against the Defendant in this Court the Sum of 127 l. That the Defendant had not paid it; per quod actio accrevit, &c. And it was thereupon demurred, because he doth not declare upon the entire Record, but begins with the Judgment; For it was objected, that inasmuch as this Action is founded upon the Record, he ought to shew all the Record; For *Nul tiel Record* is a good Plea, which Plea is taken from him by this short recital of the Record: But where the Record is but a conveyance to the Action, then this short mentioning, quod recuperasset, sufficeth; as in Debt upon Deceit, or Action for forging a Writ, &c. in such Suits it sufficeth to begin at the Judgment; as in 3 H. 6. 9. & 9 H. 6. Sed non allocatur; For the Presidents are both ways, as all the Prothonotaries of the Common Bench informed the Court: Wherefore the Court (Doderidge and Houghton being only there) held that it was well enough; and adjudged it for the Plaintiff. (3)

Ante 45.

Garret *versus* Taylor.

Action upon the Case; Whereas he was a free Mason, and used to sell stones, and to make stone-buildings, and was possessed of a Lease for divers years to come, of a stone-pit in Hedington in the County of Oxon, and digged divers stones there, as well to sell, as to build withall; That the Defendant, to discredit and to deprive him of the Commodity of the said Mine, imposed so many and so great threats upon his workmen, and all comers disturbed, threatening to maim them and vex them with Suits, if they bought any stones; Whereupon they all desisted from buying, and the others from working, &c. After Judgment by Nihil dicit for the Plaintiff, and Damages found by inquisition to 15 l. it was moved in arrest of Judgment, that this Action lay not; For nothing is alledged but only words, and no act nor insult: And causeless Suits on fear are no cause of Action: Sed non allocatur; For the threatening to maim them, and Suits, whereby they durst not work or buy, is a great damage to the Plaintiff, and his losing the benefit of his Quarries a good cause of Action. And although it be not shewn how (4)

how he was possessed for years, by what Title, &c. yet that being but a conveyance to this Action, was held to be well enough: And adjudged for the Plaintiff.

May *versus* Gybbons.

(5)

Ante 422.

Action for these words, Have you brought home the 40 l. you stole? After *Ardia*, upon Not guilty pleaded, and found for the Plaintiff, it was moved in arrest of Judgment, that these words be not actionable; For they be not spoken affirmatively, but by way of interrogation: And the Court doubted of them, and would advise. Afterward in Trinity Term 18 Jac. it was adjudged for the Plaintiff: And this Judgment affirmed in a Writ of Error brought thereupon.

Jennyns *versus* Playstowe.

(6)

Jones 120.

Rescous: Whereas he had distrained forty sheep of the Defendants, and eighty of Robert Stathams, and would have impounded them for *Damage fesant*, That the Defendant rescued them all, and took and chased them, &c. The Defendant justifies the putting in of his forty sheep into the place where, as Common; and that the Plaintiff, De injuria sua propria absque rationabili causa, took and chased them, and that he the Defendant would have taken them from him, and they ran amongst the other eighty sheep of Robert Stathams, and flocked with them; and because he could not sever them, he took and chased them, &c. Quæ est eadem Rescous transgress. And it was thereupon demurred and without argument adjudged for the Plaintiff; For although there be some colour to rescue his own sheep, yet he ought not to rescue the sheep of a stranger, who (it appears not) to have any right of Common. And although he said, they flocked together, and he could not sever them, yet he ought to have said, that he chased them to such a place to have severed them, and not that he chased them all away: Wherefore it was adjudged for the Plaintiff.

Webley *versus* Gilman, in the Exchequer-Chamber.

(7)

Ante 359.
Hob. 265.

Error in the Exchequer-Chamber of a Judgment given in the Kings Bench: The Error assigned was, That there was not any bail upon the file; and this was certified accordingly, and that he was not in custodia Marechalli: And it was held by all the Justices and Barons, that it could not be assigned for Error, for it is contrary to the Record; For the Declaration is against him as in custodia Marechalli, and he appears and pleads to the Issue as a prisoner who was in custodia Marechalli; Therefore he shall not be now received to say the contrary: Wherefore the Judgment was affirmed.

Sporc

Sporc *versus* Drury, in the Exchequer-Chamber.

ERror of a Judgment in the Kings Bench, in an Action upon the Case against an Executor, upon a promise of the Testator, to pay such a Sum for such several wares, amounting in toto to 82 l. 8 s. The Error assigned was, because the Sums did not amount to that Sum; for in truth it was 82 l. 18 s. so 10 s. Ante 499. Hob. 88. 9. Ante 247. 3 Cr. 22. more; and the Jury found 42 l. Damages: And it was held, that it was not any Error; for the mis-casting of a Clerk shall not pre-judice, especially being less than it ought to be. Secondly, It was objected, that the Judgment is erroneous; for it is, Quod recuperet damna de bonis testatoris in vita sua; and he doth not say, Tempore mortis; as the usual course is: Sed non allocatur; for it is all one, for they cannot be his Goods Tempore mortis; but they were bona sua in vita sua. Thirdly, It was objected, that the Judgment was erroneous, because the Judgment is, Quod recuperet the 50 l. 8 s. which was the 42 l. and 8 s. found for damages, and 53 s. 4 d. for costs, which was increased by the Court to 8 l. Et si non, &c. Tunc recuperet 8 l. de bonis suis propriis: And he doth not say, the foresaid 8 l. assessed for costs, nor what 8 l. And so it is not warranted by any of the Presidents: Sed non allocatur; for the sum of 8 l. being assessed for costs, shall be intended that sum only, Ante 192. and no other; although it were good to follow a former president, yet it is well enough: Wherefore the Judgment was affirmed.

Garraway *versus* Harrington, ante pag. 478. Exchequer-Chamber.

ERror a Judgment in the Kings Bench; The Error insisted upon was, that the Declaration did not comprehend sufficient Title; for it was grounded upon an Extent, which ought always to be by inquisition; and the Sheriff himself without an Inquisition cannot execute it. And here, it is not, that the Sheriff returned the Inquisition; But, that the Reversion and Rent were delivered in extent: And this was held to be an incurable fault; and for this cause the Judgment was reversed. But they did not deliver any opinion of the matter in Law, whether he were utterly barred by acceptance of that Lease, or whether the Conusee should avoid the second Extent by Action, or whether he should be put to his Audita querela; as was objected, that he might not avoid the extent of the Statute, but by Audita querela. Vide Co. lib. 4. fol. 65. Fulwoods Case, 22 Ed. 3. 7. 21 Aff. Pl. 23. (9) Co. 4. 67. a.

Goodwin *versus* Goodwin, in the Exchequer-Chamber.

(10) **E**RROR of a Judgment in the Kings Bench, in an Action upon the Case, upon a promise of the Testator; In consideration the Plaintiff would marry one Mary, sister of Sir George Fulwood, and in consideration she would accept security for the payment of 100 l. per annum to her during her life, for and in name of her Joynture; and in consideration that Sir George Fulwood should give unto the Plaintiff security for the payment of the portion of the said Mary, at the time betwixt them then and there agreed, The Testator assumed, that his Executors or Administrators should pay within a year after his death 500 l. and alledgeth in fact, that he espoused the said Mary; That she accepted of the Plaintiff a Bond of 1000 l. sealed and delivered to Sir George Fulwood, to her use, for the payment of a 100 l. during her life; That Sir George Fulwood entred into Bond to the Plaintiff for the payment of 100 l. being the portion of the said Mary, ad diem futurum & modo præteritum: And that the Testator died such a day; and that the Executor had not paid the said sums, &c. Upon Non assumpsit pleaded, and found for the Plaintiff, and adjudged accordingly, Error was brought: And it was first alledged, that this promise to tie the Executor when the Testator was never bound, is not good, no more than one can bind his Heir with an Obligation or Warranty, when he himself was not bound; which was agreed to be Law: But it was said, the cases were not alike; For the Testator may bind the Executor, whereto he himself is not bound: For the goods of the Testator are only chargeable, which he may well bind. Secondly, It was objected, that the acceptance of the Bond for the payment of 100 l. per annum during her life, is not according to the agreement; For it ought to be an assurance of 100 l. during her life, nomine Juncturæ; So it ought to be a real Assurance, which shall be a Freehold, as in bar of her Joynture, and not a Bond only: Sed non allocatur; For it is but an assurance for payment, and not, that he should make assurance for Rent; and it is such as she accepted, which is sufficient. Thirdly, That it is not alledged, to whom this Bond was made; For it is, that it was sealed and delivered to Sir George Fulwood, to the use of Mary; But he doth not say, that it was made unto her: Sed non allocatur; For it shall be intended to be made unto her: And she accepting it, non refert unto whom it was made. Fourthly, That the alledging Sir George Fulwood entred into Bond for the payment of her portion, ad diem tunc futurum & modo præteritum, is not good, because it is not alledged, that he at a day betwixt them agreed upon, at the time of the promise, &c. And if it be at any other day, it is not according to the consideration: Sed non allocatur; For it shall be intended to be upon the day agreed upon: Wherefore the Judgment was affirmed.

Clark

Co. Lit. 386. b.

Co. Lit. 36. b.

1 Cr. 19. 20.
77.
3 Cr. 143.

Clark *versus* Thomson, the Executor of Isaac, Hill.

17 Jac. Rot. 1155. or 1555.

Assumpsit: In consideration the Plaintiff would marry the Testator, he promised he would leave her worth 500 l. And alledgeth in fact that he did not leave her worth 500 l. Exception was taken in arrest of Judgment, after Verdict for the Plaintiff, that an Assumpsit lies not against an Executor upon a collateral promise of the Testator; And that this personal contract by the entermarriage was determined, as if a Release had been made; or, as where the Debtor takes the Debtor to Feme, the debt is determined: Sed non allocatur; For it never was a duty in the life of the Baron, nor ever could be released by him: wherefore it was adjudged for the Plaintiff. Note, This Judgment was affirmed in a Writ of Error in the Exchequer-Chamber, and Justice Winch shewed that such a Case was before in the Common Bench betwixt Smith and Stafford, where the Baron promised to the Feme before marriage, that he would leave her worth one hundred pounds: And three Justices there held, the Action well lay against the Executor of the Baron; But the Lord Hobert to the contrary.

Post. 623.
Ante 222.

Hob. 216.

Adams *versus* Flyth.

Error of a Judgment in Havering Court in Essex: The Error assigned was, Because the Judgment being in Debt by Nihil dicit, there was a discontinuance, viz. That after imparlance, day was given to the parties until the next Court, and no day certain: And for this cause it was held to be a discontinuance, and the Judgment was reversed. Vide Dy. 262. b.

1 Cr. 254:
Ante 314.

Coles *versus* Kinder.

Assumpsit: In consideration the Plaintiff would pay unto the Defendant the Sum of twenty pounds, he promised to assure such Land by such reasonable assurance, as by the Plaintiff should be advised and required; who devised and required an Indenture of Feoffment, with Covenant to discharge and save him harmless from all Incumbrances made by the Defendant, and for further assurance upon request to be made within such a time; And for not sealing this Assurance the Action was brought: And it was thereupon demurred; For it was said, Although he be to make assurance, yet he is not to be bound with any Covenants; And therefore he is not bound to seal that Assurance: And of that opinion was the whole Court, that although these Covenants are ordinary

Yelv. 45.
1 Rol. 424.
Ante 115.

and reasonable, yet the agreement not being to make it with reasonable Covenants, but only reasonable assurance, he is not bound to seal it ; For it is not any part of the Assurance ; and the Assurance may be without any Covenants : Wherefore it was held, that the breach was not well assigned, and the Declaration was not good : But they would advise thereof. And afterwards being moved again, they all held their former opinion, That this Assurance, with these Covenants was not within the promise : Wherefore the breach thereof was ill assigned ; and adjudged it for the Defendant.

Termino

Termino Trinitatis,

Anno decimo octavo J A C O B I Regis
in Banco Regis.

Waldoe *versus* Frances Bertlet Wid. Mich. 16 Jac.

Ejectione firmæ, For lands in Stockwood : Upon Not guilty pleaded, and special Verdict, it was found, that this land was Coppyhold, parcel of the Mannor of Stockwood, and demisable for three lives; and that the custom of the Mannor is, that the first name in the Copey shall have it during his life only, and so the others as they are named in the Copey; and that there is another custom, if any Coppyholder dies seised, having a wife at the time of his death, that his wife shall have it during her Widowity. And it was further found, that John Bertlet being a Coppyholder for life of that Mannor, and Viscount Bindon Lord thereof, infeoffed of that land J. W. and J. N. and their heirs, who in 19 Eliz. infeoffed Jo. Whitely and his heirs, to the use of him and his heirs, during the life of the said John Bertlet; remainder to Hellen, wife of the said John Bertlet for her life, remainder to the said John Bertlet and his heirs: John Bertlet grant that remainder to William Bertlet and his heirs: Afterward Hellen dies, John Bertlet takes to wife the Defendant, and dies: whether the *Feme* shall have her widows estate or not, was the question. And it was argued on the Plaintiffs part, that this Coppyhold estate was destroyed before her marriage; wherefore she cannot claim it: For by the severance of the Freehold from the Coppyhold of the Mannor, it was not any parcel of the said Mannor, but utterly destroyed: And this custom of the Mannor cannot extend thereto; For the custom is, that if a Coppyholder dies seised of any Tenements, parcel of the Mannor (and here, these Tenements be not parcel of the Mannor) therefore the custom cannot extend unto them. It was also said, Although this grant of the Freehold and severance thereof from the Mannor, doth not destroy it, if it had been granted to a meer stranger, and without the privy and assent of the Coppyholder; Because the Lords act shall not prejudice the Coppyholders estate, as it is held, Coke 2. fol. 17. & lib. 4. fol. 24. Murrel and Smiths Case: Yet here, forasmuch as it is by his privy and consent, as appears in that he takes the remainder in fee, and grants it over to his Son, he is privy, and thereby consents that it should be destroyed. It was also moved, that this Purchase of the Remainder is a destruction of the Coppyhold;

(1)
Hob. 181.
1 Rol. 502.
10, 11.

hold; For he cannot have an Interest in the Inheritance, and also in the Copyhold. It was also objected, that by the Severance being before the Defendant was married to the said John Bertlet, this custom was destroyed before she was intitled, and she cannot claim; although peradventure the *Feme* who was married before that Severance, should not be prejudiced thereby. But notwithstanding these reasons, after Argument at the Bar, It was resolved and adjudged by the Court for the Defendant, that she should have it during her Widowity: For the custom is continued quoad her, although the Freehold be severed from the Mannor: For the Lords Act shall not prejudice the Copyholders estate, and it is a privilege or benefit annexed and fixed by the custom to his estate, that his *Feme* shall have it after his death; which shall not be destroyed as long as the Copyhold estate remains undestroyed; and the Copyhold estate here remains, notwithstanding the severance from the Freehold; and not only as a privilege (as it was alledged to be) but as a mere Copyhold. And notwithstanding the remainder was in him, and he granted it over, yet he continued and died a Copyholder, and so his *Feme* shall have her widows estate: Wherefore it was adjudged for the Defendant. And upon a Case made thereof in the Court of Wards, It was resolved by the two chief Justices, and Tanfield chief Baron, That the Copyhold remained, &c.

Co. 2. 17. b.
Ante 126.

Monk *versus* Butler, Pasch. 17 Jac. Rot. 140.

(2)
2 Rol. 19.

TRESPAS: For that in the Close called Arscomb in Barwick St. John, he chased twenty of the Plaintiffs beasts: The Defendant justified for *Damage fessant*, as in his Freehold. The Plaintiff replies, that this Close contains an hundred acres, and from time whereof, &c. was known by the name of Arscomb; And shews, that the Lord *de la Ware* was seised thereof in fee; and by fine 28 H. 8. granted common of Pasture to John Shelley and his Heirs for twenty Beasts in Arscomb, who conveyed it to John Shelley, who licenced him to put in those twenty Beasts; for which, &c. The Defendant pleaded, that there was no such Village or Hamlet, nor place known out of any Village or Hamlet called Arscomb. And it was thereupon demurred: The Question was, Whether a Fine may be levied of a Close by a known name in Will, without mentioning the Will or Hamlet where it lies. And adjudged, that the fine is good enough; For it is but the agreement of the parties, which being recorded, although there be neither Will or Hamlet mentioned wherein it lies, is good enough. And notwithstanding it was objected, that a *Præcipe* ought to be in a Village or Hamlet, or place known out of a Village

1 Cr. 270.

2 Rol. 19.

of Hamlet, as appears by all pleadings : For if the place known be within a Mill of Hamlet, the Præcipe ought to be brought accordingly. It was thereto answered, True it is, in a Præcipe, or any Writ, whereto the Defendant is to answer : But here, this being but a concord and agreement of the parties, and no exception taken, but the Fine is drawn and passed, it is well enough ; But in a Scire fac. upon this Fine he must shew, that it is in such a Mill of Hamlet. Vide 1 H. 5. 9. 7 H. 6. 22. 38 Ed. 20. 21 Ed. 3. 14. 7 Ed. 6. Tit. Fines 44. So the Court resolved here ; although it be confessed by pleading, that there is not any place out of a Mill of Hamlet called Arlcomb, but that there is such a Close in Barwick St. John, yet the Fine is good, and the Defendants Plea ill. It was then moved, that this Replication was not good, nor intituled the Plaintiff ; For the Land is the Freehold of the Defendants : And the Plaintiff intitles himself to put in his Beasts by licence of him to whom the grant was made. And it was objected, that he who hath this Common, cannot licence any other to put in his Beasts, but ought to use it with his own Beasts ; and if he might licence, yet he cannot do it without deed : And of that opinion was the whole Court that this licence in another Soil, transferred over to another, to have the profit in the said Soil, cannot be without deed : But one may justify to hunt, or use the like liberties in the Soil of the Plaintiff himself, who made the licence without any Deed, as 5 H. 7. 1. & 42 Ed. 3. 2. But whether he might in this case licence another to feed there with such a number of Beasts, because it is for a certain number, and is as Pasture, and not common, which ought to be taken with the mouths of the Beasts of the Commoner, they gave no resolution, but seemed to doubt thereof : But for the other point it was adjudged for the Defendant.

Ante 272.

2 Judd. 328.

1 Vent. 10. 25.

Jouce *versus* Parker, Farmor of North-Moulton.

Prohibition: Surmising that he was seised in fee of a (3)
 Messuage, 100 Acres of Land, 20 Acres of Meadow, 60 Acres of Pasture, and upon them kept husbandry, and maintained a family to employ in husbandry, and to maintain the Plough to manure and till the said Land, and used to rear annually Colts and young Beasts to supply the stock of Horses and Oxen for the Plough ; and used to keep upon the said Tenements Milch-Kine, Bullocks, Heifers, and Sheep, for increase of Stock, and maintenance of the family ; by the labour of which the Parson had the greater Tythes : And he alledged a custom, that they used to clip the Wool from the necks of their Sheep for the preservation of the Sheep ; and at the shearing of the Sheep they used to pay the Tenth Fleece ; and
 in

2 Rol. 645. 6.

In consideration thereof used to be discharged of the Neck-wool : As also, that every Parishoner and Inhabitant within the Parish, who kept any Dren, Stéers, or Bullocks of his own, or by way of agistment which are to be employed for Tilling the Land, used to be discharged from the payment of Tythes for them. As also, that if any keep any dry Heifers pro supplemento stauri vaccarum ; In consideration that the greater number of Calves, and quantity of Milk and Dary is thereby increased, to be discharged from the payment of Tythes for such dry Heifers, &c. And Issue was joyned upon the several Prescriptions, and found against the Plaintiff : And now moved in arrest of Judgment, that notwithstanding this Verdict, no Consultation should be granted ; For as to the first, for the Wool, the Issue is ill joyned : For the Traverse is, Absque hoc quod in consideratione inde ; That they are discharged, &c. Sed non allocatur ; For although it be not a good and apt Issue, yet Verdict being given, it is aided by the Statute ; For the second and third Issues, It was moved, that they be no more then the Law appoints, viz. to be free from the agistment of Cattel, being dry Cattel, whereof no Tythes by Law are payable, as Fitz. N. B. 53. E. And then Issue being taken of that whereof by Law no Tythes be payable, no Consultation shall be granted : Sed non allocatur ; For the Prohibition is grounded upon the Prescription, and being found against it, that they have used within the Parish to pay for agisted Cattel, it is not good : Also he doth not claim to be free for Cattel agisted of his own proper Cattel, but generally for all Cattel agisted ; which is not reasonable, nor stands with Law : And it was afterwards held, That these Prescriptions being found against the Plaintiff, Consultation should be granted ; and so it was adjudged for the Defendant.

1 Cr. 237.
Ante 430.
3 Cr. 476.

1 Cr. 166.
1 Cr. 113.
3 Cr. 307.

The Lady Gargrave *versus* Gervase Markham.

- (4) **E**Rror to reverse an Outlawry in Debt after Judgment : The first Error assigned, was, because the Writ of Exigent being directed to the Sheriffs of the City of Lincoln, the Writ is, Quod Capias corpus ejus, Ita quod Habeas Corpus ejus : Where they being two Sheriffs, the Writ ought to have been, Capiatis & habeatis : Sed non allocatur ; For they both be but one Officer to the Court. And although in the end of the Writ it is, Ita quod habeatis ibi hoc breve ; yet there is no repugnancy, for it is good both ways. A second Error assigned, was, because in the Original Writ, and all the proceedings, she is named Agnes Gargrave of Kingsley in Comitatu Ebor. And in the Exigent she is named nuper de Kingsley. A third Error, because the Writ mentions, Quas recuperavit versus eum, where it ought to have been eam : And it was held, that these two last were sufficient

Ante 531.

sufficient causes to reverse the Outlawry : And for these causes it was reversed. A fourth Error assigned, was, because there was not any Proclamation in the County where she inhabited : Sed non allocatur ; for it is not necessary in an Exigent after Judgment, when she once appeared, but upon the first Process only ; Vide 2 R. 3. 15. 21 H. 6. 7. 14 Ed. 4. 6. 5 Ed. 4. 57. 23 Ed. 3. 22. where ex insinuatione, pro ex insinuatione, for want of the Writ abated.

Thomas Hollingworths Case, Pasch. 18 Jac. Rot.

THomas Hollingworth was indicted : Whereas he prim. Apr. 18 Jac. was an Inhabitant at Brainford in the County of Midd. That he at Hackney and other places within the said County was a wandring Pedler, carrying about Wares to sell in private houses, and not in open Markets and Fairs : and sold such Wares, shewing what in particular, to colour his wandring ; and so in forma prædicta was a Vagabond : And it was thereupon demurred, first, whether he may be indicted for the offence past, or ought to be only taken in the manner, and punished by the Justices of Peace according to Law. Secondly, whether by this carrying and selling of Wares in the same County where he inhabits, out of Fairs and Markets, and not elsewhere, he shall be said to be a Rogue within the Statutes. And it was adjudged that he should ; For he is a Pedler and Wandering within the words and intent of the Statutes, and may well be indicted and punished as an Offendor against the Statute : Wherefore it was adjudged against him upon the first Argument. Vide the Statutes, 5 Ed. 6. cap. 21. 14 Eliz. cap. 5. 39 El. cap. 4. (5)
St. 29 El. cap. 4.

William Busfield *versus* John Busfield, Pasch. 16 Jac. Rot. 2371. in Com. B.

ERror in Debt for an hundred pounds upon an Arbitrement made apud Castrum Eborum. Upon a submission made 1. Decemb. 13 Jac. for all matters and controversies betwixt them, Ita quod, the said Arbitrement be made under the hands and seals of the Arbitrators, ad vel ante the fifth of December following, ready to be delivered at the Shop of George Hill in the Exchange London ; And shews, that they made their Arbitrement under their hands and seals, apud Castr. Ebor. ad tunc & ibid. parat. to be delivered at the said Shop of the said George Hill in the Exchange London, and thereby arbitrated, that John Busfield should pay to William Busfield an hundred pounds ; and that one should release to the other all Actions and Demands from the 28th of November next before ; And that they (6)

Co. 8. 98. a.
1 Cr. 217.
Ante 353.

Ante 448.

Ante 285.

they should pay 10 s. to the Writer of the Award for his pains. And it was thereupon demurred; For it was pretended that here was not any award according to the submission; For the submission being 1. Decemb. 13 Jac. for all matters and demands before the said time; and it is conditioned, Ita quod, &c. This award to release all demands before the 28. Novemb. and so omitting two days before the submission; and there might be divers Controversies between the said time which is not arbitrated, is therefore no award according to the submission: Sed non allocatur; For it shall not be intended unless it had been shewn: But if it had been shewn, that there were Controversies depending, raised in those two days, which were not before, then the arbitrement had been void in all. But for the award of the ten shillings to be paid to the Writer, it was void in this point: Therefore it was adjudged for the Plaintiff. But now Error being brought and assigned in matter of Law, the Court of the Kings Bench agreed to affirm the Judgment: But it was then moved, that the Declaration was not good; For it is declared, that they made and delivered their Award apud Castrum Eborum quarto Decemb. ad tunc & ibid. parat. to be delivered at the Shop of George Hill apud London. And it was alledged, that this was a void publication and delivery; For it ought to be published and delivered at the Exchange in London, where the parties are to expect it, and not at any other place: And for this cause it is void, and not according to the submission. And of that opinion were Doderidge and Houghton; For it is reason it should be published and ready to be delivered at the places appointed where the parties are to expect it, and not at any other place; For the parties have not by intendment any Conulance of such delivery, and there being a day and place appointed, they needed not to seek it in other places, nor to take Conulance of such delivery: And as they might deliver it at the Castle at York, so they might deliver it any parts beyond Seas, and the parties may as well take knowledge of the one as the other. But Montague Chief Justice held, that this publication there, and allegation, that it was ad tunc & ibidem, ready to be delivered at the said Shop in the Exchange, was sufficient; wherefore the Court would advise. *Note*, This Exception was not taken in the Common Bench.

Upsheer *versus* Betts.

(7)

Action upon the Case: Whereas the Plaintiff the first of April, 17 Jac. and for divers years before was a Merchant, That the Defendant the said first of April, 17 Jac. spake these words of the Plaintiff, He is a Bankrupt slave, The Defendant justifies, because the Plaintiff the first of April, 15 Jac. became Bankrupt; and therefore he spake these words: whereupon the Plaintiff

Plaintiff demurred. And without argument it was adjudged for the Plaintiff, First, that these words are actionable: and secondly, that the Bar was insufficient, because he doth not alledge, that he continued still a Bankrupt; and without averment it shall not be intended that he continued so: For it may be that he afterward recovered himself, and became a good Merchant and no Bankrupt.

Ante 222.

1 Cr. 317.

Lutterford versus Peter le Mayre.

AUdita querela, to avoid Execution upon a Judgment: And suppoeth, that one John Troughton and the Plaintiff as his Surety, were obliged in an Obligation of 200 l. for the payment of 100 l. which being not paid Debt was brought, and Judgment had thereupon. Afterwards the said Jo. Troughton entered into a new Bond of 200 l. for the payment of 110 l. at another day, which was in satisfaction of this Judgment; which the Plaintiff accepted, and averred this to be for the same Debt. And it was thereupon demurred, and without argument adjudged for the Defendant; For such bare surmise, which is but matter of fact, is not sufficient to avoid a Judgment: and being but to give another action upon a Bond is not sufficient to avoid a Bond, a multo fortiore is not sufficient to avoid a Judgment. Vide 4 H.4. Dy. 1. 12 H. 4.

(8)

1 Cr. 85.

Aldrich versus Walthal Administratrix of Joh. Walthal.

DEbt: The Defendant pleaded Plenè Administravit. The Plaintiff saith, that at another time he brought an action of Debt against the now Defendant: Whereupon she was waived upon mean Process. And she brought a Writ of Error, and reversed the Outlawry: Whereupon he freshly brought this Action: And that at the time of the first Writ brought she had Assets in her hands, &c. Et hoc petit quod inquiratur per Patriam, Et defendens similiter. And hereupon Verdict was found for the Plaintiff, and Judgment given accordingly. And now Walthal brings Writ of Error: The Error insisted upon, was, that this is not any Plea; For although she had Assets at the time of the first action brought, yet she afterwards might have well administered it, by reason of a lawful recovery or lawful payment after: Sed non allocatur; For it shall not be intended without special matter shewn: And it sufficeth, if there were sufficient at the time of the first Action brought, if she doth not shew sufficient cause of discharge after that time. Secondly, it was objected, that here it is not an ill Issue: But there is not any Issue at all joyned; therefore not aided by the Statute of Jeofails; For here is matter affirmed by the Plaintiff which ought to be

(9)

E e e 2

answer.

answered unto by the Defendant by confession or denial. But here the Plaintiff doth not expect the Defendants answer, but concludes his Plea with *hoc petit*, &c. whereas he ought to have averred his Plea, and the Defendant then have answered thereto: So as there might have been an affirmative and a negative, without which no Issue can be joyned: So as here a trial is without any Issue, which is not good. And of that opinion was the whole Court: But they would advise, &c. *Residuum postea* 588.

Standred *versus* Shorditch.

- (10) **T**RESPASS for chasing his Gelding; The Defendant justifies for *Damage feasant* as in his freehold. The Plaintiff replies, that he is seised of a Messuage, and such Land in Middletonston in fee; and that he and all those whose, &c. have had Common pro 25 magnis averiis, every year after May-day in the place where, &c. and therefore put in his Gelding to use that Common. And upon this Plea, Issue being joyned and found for the Plaintiff, it was moved in arrest of Judgment, that this Plea to claim Common pro 25 magnis averiis cannot be good; For it is not certain for what Beasts he claims: Also it is not averred, that this Gelding is one of them; Sed non allocatur: For magna averia may well be intended Horses, Oxen, Kine, or other such Beasts of those kinds which are Commonable, and such, which by the common phrase of those are well known among them: And Issue being joyned and found, it is good enough. And as to the averment, that the Gelding is one of them, it needeth not, when it is not shewn that he used his Common with more than 25 great Beasts; and he saith, he put them in, to use his Common: Wherefore it was adjudged for the Plaintiff. And here, although there were not any Bill filed, nor any Plea-roll entred until after the Verdict, yet they were allowed to be entred after Exception taken; For the Record of Nisi prius was sufficient to try the Issue: And it is the usual course to enter the other Record afterwards.

1 Cr. 282.
Ante 189.

Stone *versus* March.

- (11) **E**RROR of a Judgment in a Writ of Wright in the Common Bench for Lands in Staplehurst, wherein March was Demandant, and sued by *prochein amie*; Where they were at Issue upon Non tenure, and found for the Demandant, and Judgment for him; and Error brought and assigned, because after the Writ of Error brought, and before the Issue tried, the Demandant came of full age, and ought to have appeared by Attorney, or in proper person. The Defendant in the Writ of Error saith, that tempore triationis, he was within age (*viz.* of the age of twenty years

years, six months, and no more) and thereupon they were at Issue, and found for the Plaintiff in the Writ of Error: And after Verdict it was moved, whether it might be assigned for Error; For that the Demandant at the time of the action brought was within age, and well admitted to sue by *Prochein amie*; and the Defendant did not take Exceptions to the Trial, and so admitted him not to be of full age: And if he now might assign it for Error, was the Question. And if Trial may be by a Jury, vide 20 Ed. 4. 2. 22 H. 6. 31. 48 Ed. 3. 10. 12 Aff. Pl. 37. 33 A. 6. 9. Mich. 38 & 39 Eliz. Rot. 154. *Selborough versus Raunt*, where the Defendant in Debt confessed the action by Attorney, and assigns for Error, that he was within age at the time of the confession; and they were thereupon at Issue, and tried *per pais*. The Court would advise.

3 Cr. 569.

Termino

Termino Michaelis,
Anno decimo octavo JACOBI Regis
in Banco Regis.

- (1) **M**emorandum, That the first day of this Term, Sir Thomas chamberlain Knight, late Justice of Chester, was made one of the Justices of the Kings Bench in the place of Sir John Croke late Justice there, which was vacant until this Term.

Sir William Armyn *versus* Appletoft.

- (2) **D**Ebt upon an Amercement in a Court-Baron, supposing, that he was Lord of the Mannor of Pickworth; and that he and all his Ancestors, and all whose Estate he hath in the said Mannor, have had a Court-Baron there before his Steward, to be held from three weeks to three weeks; Where it hath been used to enquire and present all Trespasses in the common fields of the said Mannor, and to punish them by Amercement: And that at such a Court holden before one Robert Clerk his Steward, it was presented, that the Defendant committed a Trespass in the common fields with his Hogs; For which he was amerced, and the amercement assayed by the Homage at ten shillings; Et sic de aliis amerciamentis; Upon non-payment whereof he brought this Action. The Defendant pleaded Non debet, and found against him: And it was alledged in arrest of Judgment, First, that this Prescription to have a Court-Baron before his Steward is not good; For it ought to be Coram Sectatoribus. And of that opinion was the whole Court: But peradventure he might have prescribed to have a Court to be holden before his Steward, but not a Court-Baron. Secondly, because it is not alledged, that any Trespass was committed, but Quod presentatum fuit that a Trespass was committed: and for this cause Houghton held it to be ill, and said, that so it had been adjudged before in this Court during his time. Thirdly, because he doth not shew when the Trespass was committed: But the Court did thereto give no great regard, but for the first fault; Absente Montague, It was adjudged for the Defendant.

Co. Lit. 58.a.
4 Inst. 268.

Pain versus Baitwick.

A Sumpfit: Whereas the Defendant sold to Henry Wood 43 (3)
 Loads of Timber, to be carried from Battle-bridge in D. in
 the County of Essex, to Limehouse in London; and in considera-
 tion that the Plaintiff would go with him to the said Henry Wood,
 and help him further in the selling of 16 Loads of Timber, and
 procure Rafter's to be laid upon Hay, and get others to assist him
 in laying the said Hay and Timber, and would carry the said Tim-
 ber to the said place at Lymehouse for 18 d. the Load. The De-
 fendant assumed, &c. The Plaintiff alledgeth in fact, that he went
 with him such a day and year to Chelmsford to the said Henry
 Wood, and helped the Defendant to sell the said 16 Load of Tim-
 ber; Et quod semper paratus fuit apud Chelmsford prædict. to per-
 form alia præmissa on his part to be performed, and to carry the
 said 43 Loads of Timber to Lymehouse: And that the Defendant,
 licet sapius requisitus, &c. Upon Non Assumpfit pleaded and found
 for the Plaintiff, it was moved in arrest of Judgment, that the
 considerations being futurely to be performed, ought to be pre-
 cisely alledged to be performed, otherwise the action lies not; And
 the Allegation, Quod paratus fuit to perform it, is not sufficient;
 Especially, as Doderidge said, paratus apud Chelmsford, the Acts
 being to be done at Battle-bridge. Wherefore it was adjudged for
 the Defendant.

Cook versus Stubbs.

IN Second Deliverance, The Defendant shews as Bayliff to (4)
 the Earl of Northumb. For that he is Lord of the Mannor
 of Topcliff; and that he and all those whole, &c. have had a Leet
 of all the Tithes in Topcliff, Dufford, Ballerby cum Norton,
 and divers other Tithes: And because the Defendant was an In-
 habitant and Tithingman in one of those Tithes within his Leet, and
 did not appear at such a Court, he was amerced; and for
 that amercement he made Conusance, &c. The Plaintiff re-
 plies, that the Earl of Devonshire was seized of the Mannor
 of Ballerby cum Norton, and had a Leet there by Prescription;
 and traverteth the Prescription in the Avowry. And upon
 evidence to the Jury it appeared, that the Earl of Northum-
 berland had a grand Leet in Topcliff extending into divers
 Tithes, viz. Topcliff, Asterby, and into divers other Villages
 on the East side of the River Swale, and in the Wapentack
 of Bridley, and into divers other Tithes, viz. Dufford, Ballerby
 cum Norton, and into other Tithes on the North side of the
 said River, and in the Wapentack of H. And all the Tithes on
 the West side have particular Leets; And yet they send a
 Constable

Ante 541.
1 Cr. 76.

Post. 623.

Constable from every Vill, and four men to the Leet of Topcliff, who present in Topcliff all matters presentable in Leets. But none other of the Inhabitants of the said Towns ever appeared at the said Leet at Topcliff. And if upon this Evidence it appeared that the Lord of Northumberland had a Leet in Topcliff of all the Inhabitants of Ballerby cum Norton; And whether this general Prescription will serve for him, was the question. And all the Court delivered for Law to the Jury, that the grand Leet hath the Superiority of all other the Leets within it. And the Reeves and four men ought to appear thereto, and inquire of all matters inquirable within the Inferiour Leets, and of the defects of the Lords of the Leets, and concealment of offences in the said Leets: But he shall not compel any of the Inhabitants and Reliants to come thereto, but only the Reeve and four men; and if they come not, the Vill shall be amerced: and in adowry he ought to make an especial prescription, and not a general, as is here; as appears 8 H. 6. 13. 13 Ed. 3. Leet 7. 11 Ed. 3. Title, Issue 40. And they said, the rule is, that every man ought to be within a Leet; and none can be of two Leets. And this grand Leet is called Turn, and is in nature of the Sheriffs Turn, which hath Jurisdiction of all Inferiour Leets within it.

Winch and Grave *versus* Sanders, Hill 17 Jac.

Rot. 462.

- (5) **D**Ebt upon an Obligation of 100 l. dated 8. February, 17 Jac. conditioned, that the Plaintiffs and one Crane should stand to the arbitrement of one Dobson of all actions and demands, &c. And that he should make his arbitrement before the eighth of March. The Defendant pleaded, Quod nullum fecit arbitrium before the day. The Plaintiffs shew an arbitrement, whereby he awarded, that all Suits betwixt them should cease; that Crane should pay to Winch forty pounds, viz. at Michaelmas ten pounds, at Christmas twenty pounds, at the Annunciation ten pounds. And if before the last payment videretur to the said Arbitrator, that the said Crane was engaged for the said Winch and Grove in any debt not satisfied, that they should repay unto him so much, as the said debt not satisfied amounted unto: and that they should release the one to the other all actions and demands before the 13th of March following. And if any doubt should arise concerning this award, that the parties should stand to his Exposition: And assign the breach for non-payment of the first 10 l. Whereupon it was demurred: And after argument at the Bar, all the Justices resolved, that it is a void arbitrement; for it appoints first the payment of 40 l. and afterwards appoints, si videretur to him, before

before the last payment, that the said Crane was engaged for Winch for any Debt which is not satisfied, the said Winch should repay back unto him so much as the said Debt amounted unto; which shews that he did not make a final award, but reserved part to his future Judgment, which an Arbitrator ought not to do; and this reservation unto himself, makes all the sum uncertain what he should have: But if it had been, that if he had shewn any Bill of Debt to such a sum, that this sum certain should be repayed, peradventure that had been good enough: But as it is now alledged, it is merely void; and then when in this part it is void, so as this Arbitrement cannot be performed, it is totally void; And although he appoints a Release of all Actions from every party, and so in shew was a final end; Yet when it cannot take effect according to his intent, it is void in all: Wherefore it was appointed to have Judgment entred for the Defendant. Vide 17 Ed. 4. 5. 39 H. 6. 12. Coke 8. 98. Baspools Case, 30 H. 6. Arbitrement in Statham, and 9 Jac. betwixt Thirn and Rigby.

Hob. 218.
Ante 315.

Ante 315.

Squire versus Johns, Trin. 18 Jac. Rot. 936.

Error of a Judgment in the Common Bench by Johns *versus* Squire, in Action for words; wherein he declares, whereas he is, and for ten years last past was a Dyer, and during all the said time used to get his living by buying and selling; That the Defendant spake of the Plaintiff these words, Thomas Johns of Hertford (innuendo the Plaintiff) is a Bankrupt Knave, and is not worth three-half-pence; After Verdict, upon Not guilty, and Judgment for the Plaintiff, Error was assigned, that these words were not actionable, because they are spoken Adjectively; and a Dyer being a Mechanical Trade, shall not have any action for these words: And it was cited to have been adjudged, that a Weaver shall not have an action for such words (but no Record was shewn thereof) But in the principal Case, all the Court resolved, that the Action is maintainable; For being alledged, that he obtained his living by buying and selling, it is sufficient cause to bring the action; and they held a Dyer to be such a Trade, that for such words he may well maintain the action: Wherefore Judgment was affirmed.

(6)

Ante 345.

Sandback versus Turvey, Trin. 17 Jac. Rot. 119. in the Common Bench, Hill. 17 Jac. Rot. in Ban. R.

Error of a Judgment in the Common Bench in Debt upon an Obligation of 200 l. conditioned for the payment of 105 l. at
 f f f f a day

(7)

1 Cr. 593:

Ante 550.

a day and place: The Defendant pleaded, that he paid at the said day and place the aforesaid hundred pounds, quas ad eundem solvisse debuit: The Plaintiff replies, Quod non solvit prædict. 105 l. at the said day and place; Et hoc petit, &c. And it was found, that he did not pay the hundred and five pound: And Judgment for the Plaintiff, and Error assigned, that there is not any Issue joyned; For the Defendant pleads payment of the said hundred pounds only: And the Plaintiff saith, he hath not paid the foresaid hundred five pounds, Quas, &c. So they do not meet, and there is not any Issue joyned; and so the Verdict ill, and Judgment erroneous. And although it was objected, that when the Defendant pleaded, that he paid prædictas 100 l. quas solvisse debuit secundum formam & effectum conditionis; It is said to be intended the foresaid hundred five pounds: And the Verdict found, that he had not paid the foresaid hundred five pounds that that should help the Issue; and compared it to the Case of Hals and Bonython, Quod vide ante pag. 550. where the Defendant pleaded payment 14. Junii, such a year. The Plaintiff replies, that he did not pay it the said 14. August the same year; and Verdict found, that he did not pay it the 14th day of June, and adjudged good: Sed non allocatur; For where the Defendants Plea was according to the condition: And the Plaintiffs Replication, Quod non solvit the said 14th day, although he mis-named the Month, which was idle, and the foresaid day had been sufficient: But here is another sum in the Plea of the Defendant then is in the condition; and another sum in the Replication then is in the Bar; and so they did not meet, and thereby the Issue ill, and shall not be aided by the Verdict, wherefore the Judgment was reversed.

Jenkins *versus* Smith.

(8)
2 Rol. 620.Hob: 91
1 Cr. 261. 516.

Ante 263. 341.

Action upon the Case by an Attorney for these words, Thou art a false Knave, a cozening Knave, and hast gotten all that thou hast by cozenage; and thou hast couzened all those that have dealt with thee. After Verdict for the Plaintiff, Exception was taken, that these words be not actionable: But the Court held the action well lay; For they be very slanderous of an Attorney, and touch him in his profession. But it was then moved in stay of Judgment, that there was a mistrial; For the words are alledged to be spoken apud S. Culham in Comit. Cornub. And the Ven. fac. was from the Parish of S. Culham, which is larger by intendment. And of that opinion was all the Court: Wherefore Ven. fac. de novo was awarded.

John Thomas *versus* Willoughby.

Assumpfit by John Thomas, Executoꝝ of Nicholas Joyce, against the Defendant; For that he promised to the said Testatoꝝ, in consideration that he the said Nicholas the Testatoꝝ would deliver unto him upon request 40 l. to repay it upon such a day: And the Declaration was, Quod idem Nicholaus dicit in facto, quod ipse idem Nicholaus delivered unto him the 40 l. And that the Defendant had not paid it unto him in his life, nor unto the Plaintiff, his Executoꝝ after his death, &c. Upon Non assumpfit pleaded, and found for the Plaintiff, it was moved in arrest of Judgment, that the Declaration was ill and insensible, Quod idem Nicholaus dicit in facto, because he is a dead person: And although it were moved, that it might be amended; For it was said to be the default of the Clerk only, who put in prædictus Nicholaus, where it should have been Johannes: Yet it was resolved, it could not be amended; For it is the very substance of the Declaration, and no precedent matter to induce thereto. And it is not like where the Issue is betwixt John and W. and the Issue is joyned, Quod idem Joh. hoc petit quod inquirat, &c. Et prædictus Johan. similiter, where it should be Et prædictus Willielmus similiter; For it is there merely the default of the Clerk, when he had a precedent Record of the Bar, and Replication to guide him how the Defendant should joyn Issue: But it is not so here, but merely the default of the Plaintiff in his Declaration: Wherefore it was adjudged for the Defendant, Quod querens nihil capiat per billam. (9)

Ante 14.

Ante 67.

Sache *versus* Yeoman.

Error of a Judgment in Colchester: The Error assigned, For that in Assumpfit the Verdict found Damages and Costs: and the Judgment was, Quod querens recuperet damna, and costs found by the Jury to 53 s. 4 d. de incremento per Curiam adjudicat. and he doth not say, ex assensu le Plaintiff, or ad requisitionem le Plaintiff, as all the Presidents are; for costs ought not to be inserted for the Plaintiff, but upon his request. And of that opinion was the whole Court: Wherefore the Judgment was reversed. And this very Term such like Judgment in Salisbury betwixt Cowslaw and Eyre was reversed for this cause. (10)

Ante 419.

Dowsewell *versus* Sir George Reynels the Marshal.

Action brought against him for suffering one William Gardner who was in Execution for 227 l. to escape: And shews how he recovered against the said William Gardner 227 l. in the Common (11)

Common Bench; and that by vertue of a Capias ad satisfaciend. directed to the Sheriff of Gloucester, viz. John Fryer and William Bagley, they took him in Execution, who in exitu ab eorum officio, by Indenture, debito modo confect. delivered him to Bullock and Robinson the new Sheriffs; and that they were amoti ab officio; prætectu ejus he was in Execution under the said new Sheriffs; and that by vertue of a Writ of Habeas corpus they returned Corpus cum causa: Wherefore he was delivered to the Marshal in Execution, who suffered him to escape. Upon this Declaration it was demurred; And Exception taken, because it was not shewn that the ancient Sheriffs delivered him in Execution, with the causes of his Imprisonment, to the new Sheriffs; For otherwise it is an escape in them, and not in the Marshal: For it may be, that he was delivered per Indenturam debito modo confectam, for other causes, and this cause was not mentioned; and then it is an escape in them, and not in the Marshal; as Coke 3. fol. 72. Westbies Case. And a Declaration ought to be certain to every intent, and shall not be aided by intendment, as Plow. 202. in the Case betwixt Stradling and Morgan, and lib. 5. fol. 120. Longs Case. And although it be said, virtute ejus he was in Execution under the new Sheriffs, yet that doth not help it; For it is but the conclusion of the premises. And if the matter before do not shew that he was in Execution, that prætectu ejus will not serve. As it was adjudged in Sir Thomas Parrets Case; where it was pleaded, that Sir Thomas Parret was seised in fee, and infeoffed J. S. and J. D. to such uses, virtute ejus they were seised: Yet because it was not said, Feoffavit inde, it was adjudged ill, and the virtue ejus did not help it. And of that opinion was Montague and Doderidge in the principal Case; But Houghton and Chamberlain doubted thereof. And it was then prayed, that the Declaration might be amended in that point; (For in truth he was delivered in Execution;) But being after demurrer entered, it could not be: wherefore it was adjourned.

Mary Walthall *versus* Aldrich, Mich. 17 Jac.
Rot. 87.

(12)
Ante 580.

ERROR of a Judgment in the Common Bench: The Error insisted upon, was, because Aldrich in the Common Bench brought Debt against the said Mary Walthall as Administratrix of John Walthall, during the minority of L. W. his Child. The Defendant pleaded *riens* the day of the Writ purchased: The Plaintiff shews, that another time, viz. 2. Junii, 15 Jac. he brought another Writ of Debt against her as Administratrix: Whereupon she was waived. The which Outlawry for the insufficiency thereof was reversed in Michaelmas Term

Term 16 Jac. And that he brought another Writ of Debt the said Term, viz. 6. November, 16 Jac. And that at the day of the first Writ purchased she had *Assets* in her hand; Et hoc petit quod inquiratur, &c. Et defendens similiter, and Verdict found for the Plaintiff, and Judgment thereupon. The Error assigned was, because there was not any Issue joyned with an Affirmative and Negative; For when the Defendant pleaded *riens* the day of the Writ purchased; and the Plaintiff saith, that she had *Assets* the day of the first Writ purchased, he ought to have concluded his Plea; Et hoc paratus est verificare, and not & hoc petit; For the Defendant might have special matter to plead, to discharge the *Assets*, viz. that she had not notice until such a day, and that in the interim she had administered, &c. as 2 Hen. 4. 21. & 40 Ed. 3. 21. And the Plaintiff concluding his Plea, Et hoc petit, &c. Et defendens similiter; It is the Entry of the Plaintiff, and Exclusion of the Defendant to rejoyne; and the Issue is oftentimes so joyned without the Defendants pivity: And therefore to this new matter, the Defendant ought to have had time to rejoyne: And of that opinion were Doderidge and Chamberlain at the first motion. But Montague and Houghton were against it; For, where the Plaintiff concludes his Plea with hoc petit, &c. If the Defendant had any special matter to shew to the contrary, he ought to have shewn it without joyning in the Issue, or might have demurred if he would: But when he accepts of the Issue, and joyns therein, it seemeth the Trial is well enough: wherefore they would advise. And afterwards upon another motion, and upon a Note shewn under the Prothonotaries hand of the Common Bench that they had divers presidents of such Replikations and Conclusions with hoc petit, &c. Et defendens similiter; and Judgment thereupon, viz. 4 Hen. 6. Rot. where, in Debt against two Administrators, they plead *Riens inter maines*, the day of the Writ purchased, nec unquam postea. The Plaintiff replies, Quod antea foits he brought a Writ of Debt against them, and a third person; and that the Writ abated, (and shews wherefore;) and that he freshly brought this Writ by Journeys Accompts: And that at the time of the first, they had *Assets*; Et hoc petit, &c. Et defendens similiter; and Verdict and Judgment for the Plaintiff. And another President shewn, 9 Jac. Rot. betwixt Cheriton and Spray, where in Debt against the Heir, he pleads *Riens per descent*, the day of the Writ, &c. The Plaintiff replies as here, Quod antea foits: He brought a Writ of Debt against him, and shews the day; and that the Defendant was therein outlawed; and how afterwards the Outlawry was reversed for insufficiency; and that he recenter brought this Writ: And that at the day of the first Writ he had *Assets*, &c. Et hoc petit, &c. Et defendens similiter: And Verdict and Judgment for the Plaintiff. And the Book of Entries,

1 Cr. 164.

1 Cr. 317.

tries 382. where is such a Replication : Wherefore they all resolved, that forasmuch as it is the Defendants fault to joyn Issue, and Trial is thereupon had, it is good enough. Secondly, It was moved, that this was not a Writ by Journeys Accompts ; For a Writ of Journeys Accompts is always where the Writ is abated by the death of one of the Plaintiffs or Defendants, or by reason of Disposition in the first Writ, or by some default or Disposition of the Clerk, or other like like cause, which ought to be manifested in the second Writ. But here is not any cause ; For it is only for that the Outlawry was discharged, and it doth not appear for what cause, so as it was done without any default in the Plaintiff. Vide Coke lib. 6. fol. 10. Spencers Case. But all the Court held, that this Writ was well brought by Journeys Accompts ; for when he pursues until the Defendant be waived, the first Original is determined : And when the Outlawry is afterwards discharged, there is not any default in him : Wherefore it is reason he should have another Writ by Journeys Accompt, which is quasi a continuing of the former Writ, wherein the Defendant shall not take any advantage, but such as he had at the time of the first Writ. Vide 13 H. 4. Execution 118. 9 Ed. 4. 5. 21 H. 6. 8. 32 H. 6. 28. 11 H. 6. 34. Thirdly, it was objected, that this Declaration was not good, because it is brought against her as Administratrix, durant. minor. etat. of L. Wastal, and it is not averred, that the said L. W. was yet within the age of 17 years : Sed non allocatur ; For true it is, if one brings an Action, and entitles himself as Administrator, durant. minor. etat. of one such, he ought to shew that he is yet within the age of 17 years, as Co. 5. fol. 29. Pigots Case ; For that he is to take Consuance how long his Authority shall continue, and he ought to shew it, to enable himself to the Action. But when he brings the Action against one as Administrator, durante minore etat. there such Plea needs not be shewn ; For so long as the other continues his meddling, he shall be sued ; and the Plaintiff needs not to take Consuance of the age of the other ; As where Joyntenancy is pleaded on the part of the Plaintiff, the Defendant needs not shew how. But if he plead it on his own part, he ought to shew in particular how. And here if her Authority were determined, it should be shewn on the Defendants part : Wherefore the Judgment was affirmed.

Hob. 251.
Yelv. 128.

Edward Pells *versus* William Brown, Hill 17 Jac.

Rot. 44.

(13)
1 Rol. 611.
835.
2 Rol. 394.
2 Ro. Rep. 216.

Replevin for the taking of three Cows apud Rowdham : The Defendant justifies for *Damage feasant*, as in his freehold ; The Plaintiff traverseth the freehold : And thereupon being at Issue, a special Verdict was found. Here the case appeared to be ; One Will. Brown, father to the Defendant, being seised of this Land

Land in fee, having issue the Defendant his Son and Heir, and Thomas Brown his second Son, and Richard a third, by his Will in writing devised this Land to Thomas his Son and his Heirs in perpetuum, paying to his Brother Richard 20 l. at the age of 21 years: And if Thomas died without issue, living William his Brother, that then William his Brother should have those Lands to him and his Heirs and Assigns for ever, paying the said Sum as Thomas should have paid. Thomas enters, and suffers a common recovery, with a single Voucher, to the use of himself and his Heirs, and afterward devises it to the wife of Edw. Pells the Plaintiff, and her Heirs; and dies without issue, living the said William Brown, who entred upon Edward Pells, and took the distress; Et si, &c. This Case was twice argued at the Bar, and afterward at the Bench, and the matter was divided into three points. First, whether Thomas had an estate in fee, or in fee-tail only. Secondly, admitting he had a fee, whether this limitation of the fee to William be good to limit a fee upon a fee. Thirdly, if Thomas hath a fee, and William only a possibility to have a fee, whether this Recovery shall bar William; or that it be such an estate as cannot be extirpated by Recovery or otherwise. As to the first, all the Justices resolved, that it is not an estate Tail in Thomas but in fee; For it is devised unto him and his Heirs in perpetuum; and also paying unto Richard 20 l. Ante 527. Both which clauses shew, that he intended a fee unto him. And the clause, If he died without Issue, is not absolute and indefinite, whensoever he died without issue, but it is with a contingency, If he died without issue, living William; For he might survive William, or have issue alive at the time of his death, living William; In which Cases William should never have it: But is only to have it, if Thomas died without issue, living William. Post. 695. Vide 19 H. 6. 74. 12 Ed. 3. 8. Coke 7. 41. Berisfords Case, 1 Cr. 58. Co. 10. fol. 50. Lampets Case; and therefore it is not like to the Cases cited on the other part, 5 H. 5. 6. 37 Aff. Pl. 15. & 16. & Dyer 330. Clactey's Case; For it is an exposition of his intent, what issue should have it, viz. of his body. And whensoever he died without issue, the Land should remain, &c. But here it is a conditional limitation to another, if such a thing happen. And therefore they all relied upon the Book, 2 & 3 Ph. & Mar. Dyer 124. & 10 El. Dy. 354. which are all one with this Case. Secondly, they all agreed, that this is a good limitation of the fee to William, by way of that contingency, not by way of immediate remainder; For they all agreed, it cannot be by remainder: As if one deviseth Land to one and his Heirs, and if he die without Heir, that it shall remain to another, it is void and repugnant to the estate; For one fee cannot be in remainder after another; For the Law doth not expect the determination of a fee, by his dying without Heirs; and therefore cannot appoint a remainder to begin upon determination thereof, as 19 H. 8. 8. & 29 H.

29 H. 8. Dyer 33. But by way of contingent y, and by way of Executory devise to another to determine the one estate, and limit it to another, upon an act to be performed, or in failure of performance thereof, &c. For the one may be and hath always been allowed: As devise of his Land to his Executors to sell, if his heir fail of payment of such a Sum at such a day, this is an Executory Devise: So the Case cited in Borastons Case, Coke 3. fol. 20. of Wellock and Hammond, where a Devise was to the eldest Son and Heirs, paying such a Sum to the younger Sons, otherwise that the Land should be to him and his Heirs, is a good Executory Devise. And a President was shewn, Trin. 38 Eliz Rot. 867. betwixt Fulmerston and Steward, where upon special Verdict, it was adjudged, whereas Sir Richard Fulmerston devised to Sir Edward Cleere and Frances his wife, daughter and heir of the said Sir Richard Fulmerston, certain Lands in Elden in the County of Norf. to them and the Heirs of Sir Edward Cleere, upon condition they should assure Lands in such places to his Executors and their Heirs, to perform his Will; And if he failed, then he devised the said Lands in Elden to his Executors and their Heirs: It was adjudged to be a good limitation, and no condition; For if it should be a condition, it should be destroyed by the descent to the Heir: But it is a limitation, and as an Executory Devise to his Executors, who for non-performance of the said Acts, entred and sold; and adjudged good: So here, &c. For it is a good Executory Devise upon this limitation. And Doderidge said, the opinion 29 H. 8. Dyer 33. was, that such a limitation in fee upon an Estate in fee cannot be; and it had been oftentimes adjudged contrary thereto. To the third point, Doderidge held, that this Recovery should bar William; For he had but a possibility to have a Fee, and quasi a contingent estate, which is destroyed by this Recovery, before it came in esse; For otherwise it would be a mischievous kind of perpetuity, which could not by any means be destroyed. And although it was objected, that a Recovery shall not bar, but where a Recovery in value extends thereto, as appears Coke lib. 1. 62. a. Capels Case; That a Rent-charge granted by him in Remainder was bound; Yet he held, that this Recovery destroying the immediate estate, all contingencies and dependances thereupon are bound, and a Recovery shall bind every one who cannot falsifie it: And here, he who hath this possibility cannot falsifie it: Therefore he shall be bound thereby: But all the other Justices were herein against him, that this Recovery shall not bind; For he who suffered the Recovery had a fee, and William Brown had but a possibility, if he survived Thomas; and Thomas dying without Issue in his life, no Recovery in value shall extend thereto, unless he had been party by way of Non-esse, (and then it should; For by entering into the Warrant he

he gave all his possibility;) Therefore they agreed to the Case which Dampont at the Bar cited to be adjudged, 34 Eliz. where a Morgagor suffers a Recovery, it shall not bind the Morgagor; But if he had been party by way of Voucher, it had been otherwise. And here is not any estate depending upon the estate of Th. Bray, but a collateral and meer possibility, which shall not be touched by a Recovery. And if such a Recovery should be allowed, then if a man should devise, that his Heir should make such a payment to his younger Sons, or to his Executors, otherwise the Land should be unto them; If the Heir by Recovery might avoid it, it would be very mischievous, and might frustrate all devises: And there is no such mischief, that it should maintain perpetuities; For it is but in a particular Case, and upon a meer contingency, which peradventure never may happen, and may be avoided by joining him in the Recovery, who hath such a contingency. And on the other part, it would be far more, and a greater mischief, that all Executory devises should by such means be destroyed. And Houghton in his Argument, put this Case; If a man gives or deviseth Lands to one and his Heirs, as long as J. S. hath Issue of his body, he by Recovery shall not bind him who made this gift, without making him a party by way of Voucher; For a Recovery against Tenant in Fee-simple, never shall bind a collateral interest, title, or possibility, as a condition, or covenant, or the like: wherefore they all (besides Doderidge) held that this Recovery was no bar. Then Doderidge took Exception to the Verdict, that the Lands were not found to be holden in Socage; For otherwise it might be intended, to be holden in Knights-service; and so it shall be intended: And then the Devise is void for a third part; and so it was resolved 24 Eliz. Dy. that it ought to be shewn that the Land was holden in Socage, otherwise the Devise was not good for the entire: But all the Justices held it not to be material (as this Case is) For the Issue is, whether it were the Feehold of W. B. who is found to be Heir to the Devisor. Then although it were admitted, that the Land was held by Knights-service; yet he hath the entire, (viz. two parts by the Devise, and a third part by descent;) wherefore the tenure is not material, as this Case is; and it was adjudged for the Defendant.

• Davies *versus* Warner.

A Sumplis: Whereas the Defendants Testator was indebted unto him in 23 l. That in consideration the Plaintiff would forbear to sue the Defendant until he had Execution upon such a Judgment, The Defendant promised to pay the said 23 l. upon request, after he had obtained Execution of such a Judgment: and alledgeth in fact, that he had obtained Execution of the said

(14)

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Judgment;

Hob. 18.

Ante 397.548.
Post. 602.4.

Judgment; Et licet requisitus, &c. such a day had not paid. Upon Non Assumpsit pleaded, and found for the Plaintiff, it was alledged in arrest of Judgment, that it doth not appear how he was indebted, nor that he had *Assets*, otherwise there is no cause to bind him: Sed non allocatur; For if the action were founded upon the debt, then he ought to shew how he was indebted: But it is grounded upon his own promise; and it shall be intended he was indebted; Otherwise he would not assume: Wherefore it was adjudged for the Plaintiff.

Abbot *versus* Rookwood.

- (15) **D**Ebt upon an Obligation of 300 l. The Defendant demand *Oyer* of the condition, which was, that if he paid to one Allen or his heirs annually 12 l. at Midsummer and Christmas, or paid to him or his heirs at any of the said feasts 150 l. then the Obligation should be void: And it was thereupon demurred; and Bridgman for the Defendant alledged, that the Obligor and his heirs hath election at any time to pay the 12 l. or the 150 l. and that there is not any breach as long as he liveth: So the action was brought where there was not any breach. But all the Court held, that the Obligation is forfeited; For true it is, as the Obligor hath election to pay the one or the other: So he ought to continue the payment of the twelve pounds annually until he pay the hundred and fifty pounds; And he may determine the payment of the twelve pounds by the payment of the hundred and fifty pounds. And forasmuch as he hath not alledged payment of the twelve pounds, or one hundred and fifty pounds, the Bond is forfeited: wherefore it was adjudged for the Plaintiff.

Rickman *versus* Cox, Trin. 18 Jac. Rot. 903.

- (16) **T**Respass, *clausum fregit* apud St. Hall, and for digging his soil; The Defendant pleads: that the place where, is two acres of Land called Blackacre, which is his freehold; and so justifies. The Plaintiff saith, that the place called Blackacre is his Freehold; Absque hoc, that it is the Freehold of the Defendant: And thereupon the Defendant demurred, because it is but a common Bar, or (as it is commonly called) a Blank-bar, and it is only pleaded to inforce the Plaintiff to assign his Trespass in a place certain; The Declaration being general, and for this cause the Bar not traversable. Vide 14 H. 8. 24. 28 H. 8. Dyer 23. And of that opinion were Doderidge and Chamberlain: But Houghton *è contra*, that this is traversable; And the Plaintiff may assign a new and other place, or may traverse this Bar at his election, per quod Adjournatur. Vide 21 Ed. 4. 1.

Hunt *versus* Clent.

Error of a Judgment in Worcester: The Error assigned, was, (17)
 That day was given to the parties till the Court to be holden
 25. Decemb. which was Christmas-day, and it was then adjourned
 until the first of January, which was New-years-day, which days
 be not dies juridici: And therefore the adjournment to those days
 void; and is not aided by any Statute, because the Judgment
 was by nihil dicit: But because the entry is, that it was secun-
 dum consuetud. villæ; And although those days be not properly
 dies juridici, yet when a Court is holden by custom upon every
 Monday, which falls out to be Christmas and New-years-day, they
 may make an adjournment every of the said days, unto a day more
 convenient, it is not erroneous; which is proved by the Statute
 of 27 H. 6. concerning Fairs; where if it so fell out, that the Fair-
 day by custom or Charter fell out to be upon a Sunday, (there
 being at every Fair a Court of Pye-powders to be held) it was
 holden upon the Sunday: But now the Statute prohibits it, and
 appoints it to be the next day before or after, which shews, that so
 was the Law before. And at this day many times the day for the
 County-Court falls upon Christmas-day, as it happened this year
 for the Counties of York and Warwick; at which County Court,
 Election for the Parliament ought to have been made, and it
 could not be altered: wherefore, here it is not Error, to hold and
 adjourn the Court upon those days; and the Judgment was af-
 firmed.

Ante 496.
3 Cr. 485.

Ante 16.

Dyer & alii *versus* Fincham, Pasch. 18 Jac. Rot. 371.

DEbt for 8 l. costs, adjudged to the then Defendant, and now (18)
 Plaintiff, upon a Non-suit. There the Defendant pleaded
 that a Capias ad satisfaciendum issued upon this Judgment, and he
 was taken in Execution for the said 8 l. Et hoc, &c. whereupon
 the Plaintiff demurred; and it was first moved, that a Capias ad
 satisfaciend. lies not for these costs; and so there was not any
 Legal Execution: And if it lies, yet he doth not plead that he is
 yet detained, &c. And it shall then be intended that he escaped out
 of Execution, and so this action well lies: But all the Court resol-
 ved, that the Plea was good; For as to the first, they held clearly,
 that a Capias ad satisfaciend. lies for costs awarded unto the De-
 fendant, upon a Non-suit; and it is the usual practice, as the
 Clerks affirmed. Secondly, when he was taken in Execution, it
 shall not be intended that he escaped; and although he escaped, he
 might be retaken in Execution, and is put to his Audita Querela:
 Wherefore it was adjudged for the Defendant.

Broad versus Jollyfe, Hill. 17 Jac. Rot. 1265.(19)
Jones 13.

Co. II. 53. b.

Lit. Sect. 360.

A Skumpfit: Whereas the Defendant was a Mercer, and kept a Shop at Newport in the Isle of Wight, and had his Shop furnished with divers old and sullied wares, and the Plaintiff had a Shop there furnished with new and fresh wares: In consideration the Plaintiff would buy of him all his said wares in the said Shop, and would pay for them such prices as he paid for them when he first bought them, That he assumed he would not then any longer keep a Mercers Shop in Newport: And alledges in fact, that he bought of him all his said wares, and paid unto him three hundred pounds for them, being the price which he had paid for the said wares when he bought them, whereas in truth they were not then worth one hundred pounds; And that the Defendant contrary to his promise kept his said Shop, and furnished it with new and fresh wares, &c. to the Plaintiffs damage 500 l. After Non assumpfit pleaded, and Verdict for the Plaintiff to his damage of forty pounds; It was moved in arrest of Judgment, that this Assumpfit is against Law, to restrain any to use their lawful Trade: And for that purpose was cited 2 H. 5. 5. where an Obligation that one shall not use the Trade of a Dyer, was held to be void; And of that opinion was Houghton Justice, for the reason above mentioned; But all the other Justices held, that it was a good Assumpfit, for it is voluntary; and upon a valuable consideration one may restrain himself that he shall not use his Trade in such a particular place; For he who gives that consideration, expects the benefit of his Customers: And it is usual here in London for one to let his Shop and Wares to his Servant when he is out of his Apprenticeship; as also to covenant that he shall not use that Trade in such a Shop, or in such a Street: So for a valuable consideration, and voluntarily, one may agree that he will not use his Trade; For *volenti non fit injuria*: And it is not like to the Case in 2 H. 5. before cited; For there it is alledged, that he was compelled to enter into such a Bond, it being an offence, for which Hull swore he would have committed him had he been there: Yet there, the Issue is taken, that he did not use the Trade of a Dyer in the said Mill; which proves, that the Defendant durst not demure thereupon; But the Bond was allowed good: But here it is upon a good consideration, viz. that he should pay three hundred pounds for wares which were not worth one hundred and fifty pounds for which he made the said promise, and is strong enough against himself. And Montague Chief Justice cited the Case in 13 Hen. 7. If a feoffment be made upon condition that he shall not alien, it is a void condition, for it is against Law: Yet a Covenant that he shall not alien

allen, is good: wherefore it was adjudged for the Plaintiff. And in Mich. 19 Jac. this Judgment was affirmed in a Writ of Error before all the Justices and Barons of the Exchequer; For they held that one may voluntarily give over his Trade, and is not compellable to use it, especially in one certain place: And therefore he may upon good consideration agree, that he will not use it within such a Till; and upon the matter, it is but the selling of his custom, and leading another to gain it. And it was said, that a Prescription to restrain one from using a Trade in such a place is good, Pasch. 18 Jac. betwixt Bragg and Tanner, Assumpsit for ten shillings, he promised to pay an hundred pounds, if he thenceforward kept any Drapers Shop in Newgate-Market; judged good, and the Plaintiff recovered.

Johns *versus* Bowen, Trin. 18 Jac. Rot. 1613.

Error of a Judgment in an Action upon the Case in an Assumpsit in the Common Bench. After the Record certified, the Plaintiff in the Writ of Error alleges Diminution for want of an Original which was certified and entered. And then the Plaintiff assigned for Error, variance betwixt the Declaration and the Original, (as in truth there was, for the Original was vicious;) which being assigned, and a Scire fac. brought ad audiend. errores, the Defendant in a Writ of Error surmising thereupon to the Court that there was another Original, and that the Plaintiff had procured an ill Original to be certified, prayed a Certiorari to certify; and the Court doubted whether it were allowable. But at length, because the Plaintiff might procure the Original, which is vicious, to be certified without the Defendants privity in the Writ of Error, and thereby cause the Judgment to be reversed; and in truth, that is not the Original whereupon the Declaration is founded: And there is a good Original, which being certified, would be in maintenance of the Judgment: Therefore the Court granted unto the Defendant another Certiorari; For one person shall have but one Certiorari; But several persons may have several Writs to certify: Wherefore a new Certiorari was awarded to certify, which being returned, it was good, and well warranted the Declaration. And then the Plaintiff in the Writ of Error would have assigned, that the Declaration and proceedings were upon the first Writ: But the Court held, that this Plea shall not be admitted, being contrary to the Record; For when there is a good writ to warrant the Declaration, it shall never be admitted to say, that it was upon another writ, but shall be intended to be upon the good writ, and that the vicious writ was unduely pursued by another, and not by the Plaintiff: wherefore the Judgment was affirmed. *Note*, It was not moved in this Case, that the Writs being both of one date and of one return,

(20)

1 Cr. 91:
An c 131.

Ante 359.

return; It did not appear which of them was first obtained; For that seemed to be material. *Note also*, that the first Writ was in consideration that the Plaintiff should lend to the Defendant 37 l. He *apud London in Parochia & Warda, &c.* promised to pay it. *Ac licet* he lent it, 10. Jan. 16 Jac. the Defendant had not paid: So there was not any place mentioned where he lent it; which was vicious.

Dartnal versus Morgan.

(21)

3 Cr. 118.

1 Cr. 343.
Ante 506.

1 Cr. 415.
Post. 668.

Assumpsit: whereas the Plaintiff locasset to the Defendant a warehouse in the Parish of St. Dunstons in the East; That the Defendant assumed to pay unto him for every week that he occupied it 8 s. and alledges in fact, that he occupied it twenty seven weeks; For which, upon not paying upon request, the action was brought. The Defendant pleads Non assumpsit, and found for the Plaintiff; and it was moved in arrest of Judgment, that this is a Lease (at least at will) of the said warehouse; and that the 8 s. weekly, is in nature of Rent, and for Rent reserved upon a Lease (which sounds in the realty) an Assumpsit lies not: And thereto the whole Court agreed, that for Rent reserved upon a Lease, an Assumpsit lies not, nor for a debt upon specialty, or upon Record: But here, so far as this is not a Lease, but a promise, that as long as he permitted him to occupy the warehouse, he would pay it; It is not any rent, but merely a promise in consideration of the occupying, &c. wherefore this action well lay; And it was adjudged for the Plaintiff.

The King versus John Hopper and others.

(22)

In a Scire fac. in Chancery, upon a Recognisance against John Hopper the Principal, who was bound in 40 l. and Timothy Hopper and Tho. Lane, who were bound each of them in 40 l. for his good behaviour; For that the said John Hopper with divers other riotous persons 4. Maij, 17 Jac. riotously at 11 in the night illicitly entered into the Close of one John Fernels in Liverington, and cut up a quick-set Hedge of the said Close. The Defendant pleads quoad all the offences, besides the entering into the Close, and cutting down of the quick-set Hedge, Not guilty; and quoad the entry into the Close and cutting down the Hedge, he justifies; For that the said Close in Leverington called Lea-Close, is, and time whereof, &c. was an high-way leading from Shelley in the said County, over the said Close unto Newport; and because the said way was stopped up with the said quick-set Hedge, he cut it up, as it was lawful for him to use the said way. The Replication was, that the foresaid John Hopper de injuria sua propria & ex malitia sua præcogitata, with the other riotous persons, cut down the said quick-set Hedge, prout it is before alledg-

ed;

ed; Et hoc petit quod inquiratur, &c. Et defendens similiter: And the Verdict was against the Defendant. And it was now moved in arrest of Judgment, that there is not any Issue here joyned, For de injuria sua propria, where one justifies for a way, or such particular cause, is no Issue: But he ought particularly to traverse the Prescription alledged, as it is resolved, Co. 8. fol. 66. 7. a. Crogats Case. Also if it should be a good Plea to say, De injuria sua propria, yet he ought to say, absque tali causa; For the whole Case is in Issue: And of that opinion was the whole Court. Secondly, admitting it to be a good Issue, yet there is a mistrial: For the Ven. fac. is only de Liverington, where the Close is, whereas it ought to have been also from Shelley and Newport, from which places and to which places the way is supposed to lead. And so was the opinion of the whole Court: But then it was moved, that here was an Issue of Not guilty, which is for the riotous entry, and riotous Assembly, which is a breach of the good behaviour: wherefore the Issue is well joyned and tried for that. But the Court held, that that Trial of the Issue of Not guilty, is but matter of form; and the substance is upon the special matter found: And if it had been found for the Defendant, it should not have been inquired of; and the trial had been ill for all: wherefore it was adjudged for the Defendant that he should be discharged.

Hob. 189. 303.
3 Cr. 426.

Ante 252.
1 Inst. 81.

Greeve *versus* Dewel.

T Respass: Upon special Verdict the Case was such, William Greeve was seised of this Land in fee, having two Sons Richard and William, and devised it to William his Son for his life, and after to Thomas Son of the said William his Son (except the said William his Son purchased other Lands of as good value for the said Thomas, and then the said William to have the said Lands so devised, to sell at his pleasure,) and Thomas to pay to his two Sisters ten pounds a piece. William did not purchase any Land, and died; Thomas enters and pays the ten pounds a piece to his Sisters. What estate Thomas had, whether a fee or for life only, was the question: (For Thomas was dead, and the Defendant claimed under his Heir; and the Plaintiff was Heir to William the Devisor;) And all the Justices resolved, that Thomas had a fee; For to his intent though the whole Will appears to be: For when it is limited to William for his life, which is an express estate, and there is no estate limited to Thomas, but it is appointed that he shall pay to his two Sisters ten pounds a piece; If the Exception had not been omitted, (which is but a Parenthesis) it had been apparent that he should have a fee by his intent, and by the Law: For these words, And he to pay, &c. is all one as if

(23)

Ante 527.

Ante 527.

it

it had be'n said, paying such a Sum. And that is in consideration of the Land devised, and not in respect of the Land purchased by him; For it cannot be annexed thereto. Vide for this point, Coke 3. fol. 21. a. Boraftons Case, and lib. 6. fol. 16. Colliers Case. And the Exception makes it the stronger; For it is limited, If *William* purchase other Land, of as good value for *Thomas* (which is intended of an estate in fee) that then *William* shall have that Land devised to sell at his pleasure; which is that *William* should have the fee back from *Thomas*; And the Exception not being performed, it thereby appears, that *Thomas* should have a fee; wherefore rule was given to enter Judgment accordingly for the Defendant. But afterwards, by the opportunity of the Plaintiff, being a poor man, and quasi distracted, they would advise thereof until the next Term, that in the interim there might be composition betwixt them: And Athoe Serjeant (who was for the Defendant) said unto the Court, that this question was in the Common Bench betwixt Greve and Armsted upon this Will: And it was there adjudged to be an estate in fee in *Thomas*, and not for life only, as the Plaintiff would pretend.

Stamp and his wife *versus* White and his wife.

(24)

Action for words, for that the Defendants wife spake of the Plaintiffs wife these words; Thou art a Theevish Rogue, and a Theevish Quean; For thou hast stoln my Faggots; (innuendo five Faggots of the said Whites and his wives:) The Defendants pleaded Not guilty, and being found for the Plaintiff, it was moved by Briscoe in arrest of Judgment, that these words be not actionable; For the first words, Theevish Rogue, &c. are too general, and adjectively spoken, and do not charge her to be a Thief. For the other words, Thou hast stoln my Faggots, it is impossible; For, a *Feme covert* hath not any goods which can be stoln; Sed non allocatur; For they be words very scandalous, and are to be understood according to common intendment, that she charged her with the stealing of her Husbands Faggots: And charged her with felony; and whose the goods were is not material: wherefore it was adjudged for the Plaintiff.

Post. 601.

1 Cr. 52.
3 Cr. 279.

Martin and his wife *versus* Stradling.

(25)

Action for these words of the Plaintiffs wife; Thou art a Witch, and hast bewitched my wives milk: After Verdict for the Plaintiff, it was moved in arrest of Judgment, that to say, Thou art a Witch, generally without more, is not actionable: Then to say, Thou hast bewitched my wives milk, is insensible; For

Ante 399.

For a *Feme* cannot have milk of *Kine*, but it is her *Husbands*: Ante 600.
 And it may be intended, that it was the milk in her breasts; And
 being doubtful, it is not actionable: Wherefore the Court would
 advise.

Eyres versus Sedgewicke, Trin. 18 Jac. Rot. 981.
 Wiltsh.

Action upon the Case: Whereas Anne Petty, Term. Mich. 16 Jacob. procured a Supplicavit of the good behaviour against William Parry, directed to the Sheriff of Wilts, and obtained a Warrant for the arresting of the said W. P. to find Sureties, directed to the Defendant and others, as special Bailiffs, who arrested the said W. P. and afterwards negligently suffered him to escape: that the Defendant afterwards made a false Affidavit in the Chancery concerning the execution of this Warrant; (and shews what verbatim.) The substance whereof was, that he by virtue of the said Warrant arrested the said W. P. And that the Plaintiff and others violently rescued the Prisoner, so as he escaped; And that the said Plaintiff held him till the Prisoner escaped; ubi revera, he did not rescue him, nor hold the Defendant till the Prisoner escaped. By reason of which false Oath he was imprisoned by the Lord Chancellor, and enforced to be at great expences for his deliverance; For which cause he brought this Action. The Defendant pleaded Not guilty, and found against him, and now moved in arrest of Judgment, that this Action lies not; For when any one takes an Oath in a Court, the Court always presumes it to be true, until his Oath be disproved, and he be convicted of Perjury by Endictment or Censure in the Star-Chamber, or otherwise; And not in an Action upon the Case: For it would be very mischievous if the truth or falshood of an Oath should be tried by Action upon the Case. And as to that point was cited 21 Ass. Pl. that Action upon the Case lies not against an Endictor; for that he did it upon his Oath; And a Case, Mich. 38 & 39 Eliz. 1 Cr. 521: in the Common Bench, betwixt Dampson and Smithson, where it was resolved, that where an Action upon the Case was brought against the Defendant, supposing that he gave false testimony concerning the value of a Jewel, Judgment was, that the Action lay not; For then every one should be drawn in question by Actions upon the Case; which would be inconvenient: And of that opinion were Montague, Doderidge, and Chamberlain, who delivered their opinions seriatim, that this Action lay not; For, for misdemeanour in Courts, every Court (where the abuse is committed) shall have the examination thereof, and if they find misdemeanours, may punish it: But to punish it by an Action upon the Case,
 P h h h upon

3 Cr. 714.

3 Cr. 714.

upon pretence of a false Oath, shall not be suffered; For, as Doderidge said, if it should be examined in an Action upon the Case, then peradventure one Witness would swear against that which the other had deposed upon his Oath, and so there should be Oath against Oath; And the Law cannot know which of them is true, but shall presume the one to be as well true as the other: wherefore the Law will not suffer such an inconvenience, but it ought to be punished by conviction upon Enditement, or Suit in the Star-Chamber. And Doderidge said, that he knew in the Case of Skelther *versus* Harrison, in this Court, where an Action was brought against one for putting in ill and false Bail, to discharge his Bail in London; The better opinion was, that the Action was not maintainable; but by his means the Action was compounded, and no Judgment given: So they held here, that this being an offence in a judicial Court, an Action upon the Case lies not. But Houghton Justice held the contrary; For being averred to be false, the action is well maintainable, for he is damaged by that false Oath; and there is not any reason he should be without remedy: Also, this Affidavit is a voluntary act by him; Wherefore if it be false, it is reason he should have his remedy against him; For an action upon the Statute of 5 Eliz. for Perjury, lies not upon such a false Oath. But if he had come in by Process of Law, as a Witness, it had been otherwise; For if it were false, he were punishable by the said Statute, or by Enditement; But not here: Wherefore he conceived it reasonable, that the action should lie: But notwithstanding his opinion, it was adjudged for the Defendant.

Bard *versus* Bard, Trin. 18 Jac. Rot.

(27)

Assumpfit; Whereas they Insimul computaverunt, concerning the arrearages of such Rent issuing out of the Defendants Land, and about payment of a Legacy of 50 l. due unto the Plaintiff by his Fathers Devise; and it was found that 300 l. was due unto him: That the Defendant in consideration thereof, promised to pay it at such a day. The Defendant pleaded Non assumpfit, and found against him: And it was moved in arrest of Judgment, that it doth not appear here, that the Defendant was Executor, or was chargeable with the payment of this Legacy, nor that he had *Assets* to pay it, nor how he was chargeable to the payment of this Rent; Therefore there is not any consideration for this promise; so no cause of action; Sed non allocatur; For it shall be intended he was chargeable, otherwise he would not have made any such promise: And they accompting together, and he promising to pay, was a sufficient cause of his action: Wherefore it was adjudged for the Plaintiff.

Ante 594.
Post. 613.

Hills *versus* Cooper, Trin. 18 Jac. Rot. 361.

DEbt upon an Obligation for 33 l. The Defendant demands (28)
Oyer of the Bond, which was entred in these words, Nove-
 rint, &c. teneri in terengentate liberis : And thereupon the De-
 fendant demurred, because both words are insensible, and cannot Ante 147.
 be taken for 33 l. For terengentare is not thirty three, nor liberis Co. 10. 133. B.
 is liberis: Wherefore it was held by the whole Court to be a Ante 355.
 void Bond, and cited that betwixt Partrole and It was
 adjudged, that where a Bond was in 20 litteris pro libris, it was Ante 203.
 a void Bond, and so here : Wherefore it was adjudged for the
 Defendant.

Bayley *versus* Purley, Trin. 18 Jac. Rot. 1275.

Assumpsit: Whereas the Defendant being indebted unto (29)
 him in 200 l. for a Legacy given unto his *Feme*, promised,
 if he would forbear the payment, that he would pay him for it
 according to the rate of ten pounds per cent. And alledged in
 fact, that he forbore him from the 26th of August, 17 Jac. which
 was the day of the promise, until the time of the Will exhibited,
 viz. 26. Januarii, 17 Jac. and that he had not paid the 200 l. nor
 9 l. 4 s. for the forbearance for the said time, licet requisitus 12.
 Febr. 17 Jac. After Verdict, upon Non assumpsit pleaded, and
 found for the Plaintiff, it was now moved in arrest of Judg-
 ment, that the Declaration was not good; First, Because it is
 in consideration that he should forbear, and he doth not shew any
 time. Secondly, Because it is alledged, that nine pounds four
 shillings is due for the said time from August to January, and
 doth not say secundum ratum of 10 per 100. And in truth, upon
 computation, this is more than is due. Thirdly, For that the
 request is alledged to be after the Action brought: And upon the
 first motion they held the Declaration to be ill, especially for the
 second cause; and appointed that Judgment should be stayed until
 it were moved on the other part.

John Stowes Case.

John Stowe was endicted upon the Statute of 31 Eliz. be- (30)
 cause he had erected a Cottage five years last past, and 31 El. cap. 7.
 had not allotted four Acres of Land, according to the said
 Statute de terris mensurandis, 33 E. 1. and had continued it
 ever since. The first exception was, that this Indictment was Post. 611.
 for erecting a Cottage five years past, whereas every of-
 fence ought to be punished within two years by Endic-
 ment

ment or information, by the expresse words of the Statute of 31 Eliz. cap. 5. otherwise it is not punishable, and therefore not good. Secondly, Because he doth not say, that he voluntarily continued it; which are the expresse words of the Statute. Thirdly, For that it is expresse to be by the Statute de terris mensurandis, whereas there is not any such Statute, but it is an Ordinance only: And for these causes the Endicement was held to be ill; and the Defendant was discharged.

Evans *versus* Warren.

(31) **A**ssumpsit: Whereas Robert Warren Testator to the Defendant, was indebted unto him in 26 l. The Defendant being his Administrator, in consideration inde, and that the Plaintiff would forbear to sue him until he had execution upon such a Judgment, promised to pay within a month after execution obtained: And alledged in fact, that he forbore, and that the other obtained execution, and had not paid. After Verdict, upon Non assumpsit pleaded, it was moved in arrest of Judgment, that this was not any consideration to sue him being Administrator, unless it had been alledged that he had *Assets*, which was not done: And the Court doubted thereof; pro quo adjournatur.

Post. 613.
Ante 594.

Lutwich *versus* Mitton, in the Court of Wards.

(32) **I**t was resolved by the two Chief Justices, Montague and Herbert, and by Tanfield Chief Baron, That upon a Deed of bargain and sale for years, of Lands whereof he himself is in possession, and the Bargainee never entred; If afterwards the Bargainers make a Grant of the Reversion (reciting this Lease) expectant upon it, to divers uses, that it is a good conveyance of the Reversion: And the Estate was executed and vested in the Lessee for years, by the Statute; and was divided from the Reversion, and not like to a Lease for years at the Common Law: For in that case there is not any apparent Lessee, until he enters; But here, by operation of the Statute, it absolutely and actually vests the Estate in him, as the use, but not to have Trespass without entry and actual possession: Wherefore they would not permit this point to be further argued.

Jones 7.

1 Cr. 110.

1 Cr. 110.
400.

Co. 5. 124. b.

Dawney *versus* Dee, & alios, Trin. 18 Jac. Rot. Suffex.

(33) **A**ction upon the Case; Whereas the Plaintiff 5. July, 16 Jac. was seised in Fee of a Capital Messuage, called Moor-place, and one hundred acres of Land and Meadow in Petworth, occupied with the said Messuage, of the annual value of one hundred pounds, In which Messuage he and all those

those whose Estate, &c. and their Farmers and Tenants thereof, from time whereof memory, &c. have used to keep Hospitality: And that whereas within the Parish Church of Petworth the said 5. July, 16 Jac. and from time whereof, &c. there was, and yet is, a little Chappel on the North part of the Chancel, called the Parsons Chancel, parcel of the Church; And whereas the said 5. July, 16 Jac. and from time whereof, &c. were seats placed in the said Chancel: And whereas the Plaintiff, and all those whose Estates, &c. from time whereof, &c. have used to repair and sustain the said Chancel, and the seats therein, as often as need Anie 366. required; By reason whereof he and all whose Estate, &c. he hath in the said house, have used for him and his family, to sit in the seats of the said Chancel, and to bury the persons dying within the said house, in the said Chancel; and that none other during all the said time, without their license, used to sit there, or to be buried there: That the Defendants præmissorum non ignari, malitiosè impediverunt him to enter and sit in the said seats in the said Chancel, to hear Divine Service, from 5. July, 16 Jac. until the first of May, 18 Jac. whereby he could not enter into the said Chancel, and sit within the seats thereof, to his damage of forty pounds. The Defendant pleads, that the Earl of Northumberland, the foresaid 5. July, 16 Jac. & semper postea, was seised in fee of the Honor of Petworth in the County of S. And that the said Chancel is parcel of the said Honor; And that the Defendants the said 5. Julii, 16 Jac. being Servants to the said Earl, and resident in the said Honor, divers times afterwards, until 1. May, 18 Jac. when Divine Service was celebrated in the said Church, sate in the seats of the said Chancel, by command of the said Earl, to hear Divine Service there; Quæ sunt eadem impedimenta, whereof the Plaintiff complaineth. And upon this the Plaintiff demurred; First, because they plead, that it is parcel of the Honor, which cannot be; For being alledged, that it is parcel of the Church, it cannot be parcel of the Honor: So the substance of the Declaration is not answered. Secondly, Because it is supposed by the Declaration, that they disturbed him totally to enter into the Chancel, and to sit there; which is not answered by this Plea: And of that opinion was the whole Court, that the Bar was not good. But then exception was taken to the Declaration, because he prescribes to have that liberty appertaining to his house, and doth not shew that it is an ancient house; otherwise he cannot prescribe thereunto, as in the case, 6 Eliz. Dy. 71. of Ale-Brewers Park: Sed non allocatur; For the Court said, there was a difference when one Hob. 44: prescribes to have an Office, and the profits thereto, he ought to shew it to be an ancient Office; And for a custom in a Mill, he ought to shew that it is antiqua Villa: But when it is supposed, that he is seised in fee of a capital Messuage; and time, &c. had

had to that appertaining, &c. it is therein included, that it is an ancient Messuage, and might have such a privilege. Secondly, It was objected, that this allegation of the disturbance was ill, without alledging a special disturbance, how he was disturbed particularly : Sed non allocatur ; For it sufficeth to alledge a general disturbance : So it is usual to alledge it in an action for disturbing one to use a fair or Market, or to hold Court, and take the profits. And an experts president was cited in this Case : whereupon this Declaration was framed in the new Book of Entries, fol. 8. the Case of Sir John Harvey, where he prescribed to have to his Manor of Ravenscroft a burying-place and seats within the Church of Hardinkton ; and for disturbance of his burying there, he brought his Action ; and adjudged for the Plaintiff there : Wherefore it was adjudged for the Plaintiff.

Termino

Termino Hillarii,

Anno decimo octavo JACOBI Regis
in Banco Regis.

Memorandum, In this Vacation betwixt Michaelmas and Hillary Term, Sir Henry Montague Chief Justice of the Kings Bench, was made Lord Treasurer of England, and sworn in the Exchequer by a special Commission directed unto the Lord Chancellor and Barons, because it was in Vacation-time; notwithstanding which he exercised his Office of Chief Justice, as in taking of Statutes, filing Bail, &c. during all the Vacation, because he had not any Writ of discharge from his place of Chief Justice, &c. And Sir Henry Felverton the Kings Attorney, was removed, and Sir Thomas Coventry of the Inner-Temple, the Kings Solicitor, made Attorney; Robert Heath of the Inner-Temple, Recorder of London, made the Kings Solicitor; and of Grays-Inn, made Recorder of London. (1)

Hulbert *versus* Long, Mich. 14 Jac. Rot. 243.

DEbt upon a Bill obligatory, demanding thirty two pounds four shillings and seven pence: The Defendant demanded Oyer of the Bill, and it was, threty two ponds four shillings and seven pence; so threty for thirty, and ponds for pounds: And for this cause it was demurred, and adjudged for the Plaintiff. Vide 9 H. 6. 7. 9 H. 7. 16. Co. 10. 133. Osburns Case. (2) Ante 147. Ante 355.

Gerrard *versus* Wright, Hill. 15 Jac. Rot. 1510.

Prohibition in the Common Bench: The Case was, The Prior and Covent of Hatfield Broad-oak in the County of Essex, was seised in fee of the Rectory appropriate of Hatfield Broad-oak, and of a Farm called Downhall in the said Parish; Time whereof, &c. And the said Prior being dissolved by the Statute of 27 H. 8. (being one of the small Monasteries,) an. 29 H. 8. the said King granted all the Priory of Hatfield, and their possessions, to the Priores and Nuns of Berking, anno 30 H. 8. The Priores and Nuns of Berking by Deed enrolled, surrender their possession to King H. 8. Afterwards the Statute of 31 H. 8. was made; the Rectory of Hatfield was granted unto Trinity-Colledge in Cambridge, who let it to the Defendant: And the said Farm of Hatfield was afterwards granted to one who let it to the Plaintiff. The Defendant sued the Plaintiff in Court-Christian for Tythes of the said Farm; and he brought thereupon a Prohibition (3) Jones 2. Hob. 306. 1 Cr. 425.

Prohibition containing all this matter; And it was thereupon demurred: And after argument at the Bar and Bench, Judgment was given for the Defendant, that consultation should be awarded; For Hutton, Winch, and Hobert resolved for the Defendant; First, they held, that Appropriations to such Abbeyes, Churches, &c. to them belonging, and what concerns any way their profits, are given. Secondly, Because very much of the possessions of such inferiour Priories consisted in Rectories appropriated, and the intent was to give them to the King. Thirdly, Priories and Synodals were reserved to the Bishop; For they properly belonged to the Bishop out of the Appropriations. Fourthly, Because there is a saving of all Rights and Interests of all persons, others than the Founders, Donors, and Patrons: And if the Appropriation it self shall be dissolved, by the dissolution of the body whereto it was annexed, it never was the intent that the Abbowlson should return to the Patron; wherefore this shews the intent of Statute, that it should be given to the King, and should never be dissolved. A second point resolved by them, was, that a perpetual unity of a Church appropriated, and the Land, is not any discharge of the Tythes of it self: And the Statute of 27 H. 8. doth not give any discharge, but gives only the possessions as they were in the hands of the Abbots; And that refers to the possessions, and not to the Tythes out of them, which are collateral things. And so there be divers discharges of Tythes; First, Real Composition, which a Layman may have. Secondly, Discharge by reason of order, as Cistercians, &c. Thirdly, By reason of papal Bulls. Fourthly, By Prescription, which ought to be only by a Spiritual Corporation; And if the Statute of 31 H. 8. had not been made, the personal discharge, as by Bulls, or by reason of order, had been discharged also, for that the persons to whom they were annexed were dissolved: therefore, to prevent it, the Statute was made, which ordains, that where any Monastery was discharged from the payment of Tythes, in such case the King shall hold the Land discharged, notwithstanding the Corporation to which such Priviledges were annexed be dissolved; And there is not any clause to this purpose in 27 Hen. 8. And this Statute of 31 H. 8. doth not extend to Monasteries dissolved by the Statute of 27 H. 8. therefore this reason of unity of possession is not any discharge in it self of the Tythes; And the Statute of 31 H. 8. doth not extend to the Land in question, because it doth not intend to give a discharge, but to the Lands which came to the King after the fourth of February, 27 H. 8. And these Lands in question were not given within that time, therefore the discharge given by the Statute of 31 H. 8. doth not extend unto them. *Sæ* for this, Coke lib. 2. Green and Balfers Case, fol. 467. a. Lands given by the Statute of Prim. Ed. 6. have

Hob. 308.

1 Cr. 424.

Co. 2.47. b.
Hob. 296.

Hob. 442

1 Cr. 425.
Hob. 309.
Ante 453.

Ante 58.

Jones 4.

have not the benefit of the Statute of 31 H. 8. And all the clauses of 31 H. 8. which touch the possession of the Monasteries, have relation to those Lands which came unto the King after the fourth of February, 27 H. 8. And although this clause of discharge of Cythes be in general terms, yet it shall have relation to the Lands which were before mentioned: Also in the clause it is mentioned, which were the said Abbots, which is to be intended to be the Abbey mentioned in the said Statute of 31 H. 8. And Justice Hutton cited a Judgment in the Exchequer, in the point, betwixt Liver and Read, 37 Eliz. But Warburton Justice argued Jones 4. to the contrary; For he held, that Appropriations were not given to the King by the Statute of 27 H. 8. Wherefore to supply that defect, the Statute of 31 H. 8. was made; Therefore those Appropriations being given by the Statute of 31 H. 8. the said discharge extends unto them. Secondly, the intent of the Statute of 31 H. 8. was to give equal discharge to the one as to the other, as well to the Land given by the Statute of 27 H. 8. as to the Land given by 31 H. 8. And upon this reason is the Case of the Land of the Prior of S. Johns of Jerusalem, in 10 Eliz. Dyer. But notwithstanding, consultation was granted. Note, This Case is so reported by Justice Jones, p. 2, 3.

Memorandum, The first day of February this Term, Sir James (4)
Lea late Attorney of the Court of Wards, was made chief Justice of the Kings Bench, and the Lord Chancellor came and sat in Court; And Sir James Lea came betwixt two of the Kings Serjeants unto the Bar, where the Lord Chancellor made a short Speech unto him, of the Kings favour, and reasons in electing him to that place: And he being at the Bar, answered thereto, shewing his thankfulness, and endeavour in the due execution of his Office. He then went into Court, and had his Patent delivered him; which was openly read, and was a short recital only, that the King had constituted him to be chief Justice there, commanding him to attend and execute it; It was under the Great Seal; He was then sworn.

Johnsons Case.

Johnson Innholder of the Red-Lion in Holborn, was indicted (5)
upon the Statutes of * 13 R. 2. & 4 H. 4. Whereas the com-
mon price of Dats in Brainford betwixt the first of March, 15 Jac. * Rep. 21 Jac.
and 1. Martij, 17 Jac. was not above the rate of 20 d. pro quolibet c. 21. & 23.
modio; That the Defendant, existens communis stabularius, sold
diversis subditis Dom. Reg. infra domum mansionalem in Holborn,

two hundred bushels of Oats for two shillings eight pence the bushel, contra formam Statut. in hujusmod. cas. edit. & provis. The Defendant pleaded Not guilty, and found against him: And now divers Exceptions were taken to this Indictment; First, Because the Defendant hath not any addition; And by the Statute of 8 H. 6. every Endicment or Process, whereupon any is endided, ought to have the addition; Therefore the Endicment was void: Sed non allocatur; For the Court said, true it is, that an addition ought to be in Endicments: And if a party be Outlawed, and there be not any addition, the party may avoid the Endicment for want of addition, or by exception thereto, upon his appearance: But when he appears, and doth not take Exceptions, but pleads to the Issue, and it is found against him, he admits it, and hath passed by the advantage, and cannot now take exceptions for want of addition. Another exception was taken, because the Endicment is, Quod commune pretium in mercatis, &c. was not, ultra 20 d. the bushel, which is uncertain; For it is not said what was the price, which ought precisely to be shewn; For he is to forfeit by the Statute 4 Hen. 4. for every bushel sold by him over and above the common price in the Market, the quadruple value; and therefore he ought to shew what was the common price in the Market: Sed non allocatur. A third exception was, because the Endicment is, Quod commune pretium pro quolibet modio avenarum non fuit ultra, &c. where it ought to have been pro modio, or pro aliquo modio, and not pro quolibet; For as this Endicment is, although divers bushels be sold at above twenty pence, if every bushel be not sold at that price, it is an offence, which ought not to be so alledged: Sed non allocatur. A fourth exception was, because the Endicment is, Quod Johannes Jonson existens communis stabularius, sold, &c. which infers, that he was a common hostler at the time of the Endicment, and not at the time of the offence committed: And it was compared to an Endicment upon the Statute of 8 H. 6. which hath been oftentimes discharged as void; For that is, that one such entered into Land, existens liberum tenementum of the said J. S. which might be at the time of the Endicment, but not at the time of the Entry; And it ought to be certain, and not by intendment: Sed non allocatur; For there the offence is not referred to the time of the entry into the Land precisely, being referred to liberum tenementum: But here, it is to the person, which may be well intended at the time of the selling, &c. as 28 H. 8. Sciens canem ad mordendum oves consuetum, &c. refers to the person, and to the time of the offence. A fifth exception was taken, because the Endicment is, That he sold within his Mansion-house, and doth not say within his Inn: Sed non allocatur; For it shall be intended to be all one. A sixth Exception was taken, because he sold

Post. 616.

Ante 365.

Ante 552.

Ante 214.

sold diversis subditis Domini Regis, and doth not say, hospitibus; nor to be expended for provender; For otherwise it is no offence, if he doth not sell them for provender to be expended in the house: For if he sell them in gross to be carried into another Country, or Realm, it is not any offence within this Statute: Sed non allocatur. A seventh exception was, because it is not shewn what time he bought or sold these Dats, and it might be many years before, and therefore he ought to have expressly set out the precise time, and within the said Markets, and sold therewithin the said time, otherwise there is not any precise offence shown: Sed non ^{Ante 603.} allocatur; Wherefore it was adjudged for the King. *Note*, This was the first Case which was adjudged by Sir James Lea, after he was Chief Justice, upon the first argument, by the importunity of Sir Thomas Coventry the Kings Attorney, who pretended to have the more speedy dispatch for the benefit of the Commonwealth: And that many of these faults were aided by the conclusion of the Endicment; That these offences were done against former Statutes, &c.

Sir Henry Snelgar *versus* Henston

R Eplevin of the taking of four Beasts; The Defendant avows ⁽⁶⁾ for Rent reserved upon a Lease for years, of the moiety of the ^{1 Roll. 699.} Land, whereof he was Tenant in common with Sir Henry Snelgar, rendering one hundred pounds per annum; And that this Lease was assigned to Sir Henry Snelgar; Wherefore he distrained: And it was demurred, whether one Tenant in common may distrain upon the other; And adjudged, that it might be, where he comes in, under the Lessee: And the distress may be taken in any part of the Land: Wherefore the Defendant had return. It was then surmised on the Defendants part, that forty Beasts were taken and impounded, and all the forty were not delivered back again, and therefore prayed that the Sheriff should make deliverance unto him of forty; for four Beasts were not a sufficient distress; And he had taken security of the Plaintiff to prosecute for forty Beasts taken; wherefore the Sheriff should deliver all the Beasts, or his Bond to prosecute: But the Court denied it, ^{Ante 369.} forasmuch as the Plaintiff had declared but of four Beasts taken, and the Defendant agreed, that four were only taken, and avows for them, he is therefore now without remedy: But he might in his Avowry have shewn that forty Beasts were taken, and have avowed for all, and prayed return of all, although the Plaintiff had not declared of so many; But because he hath not done so, he is without remedy to have return of more than he avows for the taking.

Parker *versus* Brown.

(7)

Assumpſit: Whereas he was Suitor to the Sheriff of Middlesex, to obtain the Office of Under-Sheriff for such a year, and to be made Under-Sheriff for the same year, and was very likely to obtain the said place; For which the Defendant also at the same time was a Suitor; That the Defendant in consideration the Plaintiff would desist his Suit, promised to the Plaintiff, if he obtained the said Office, and was made Under-Sheriff, to pay unto the Plaintiff 20 l. for such a Gelding, which the Plaintiff had delivered unto him: And alledgeth in fact, that he delivered to the Defendant the said Gelding; and that the Defendant was made Under-Sheriff, and executed that Office for the said year: And that he had not paid, &c. Upon Non assumpſit pleaded, and Verdict found for the Plaintiff, Judgment was given in the Common Bench for the Plaintiff; And now Error brought in the Kings Bench: And the Error insisted upon, was, That this is no lawful nor valuable consideration. But all the Court held, that the consideration was good and valuable; For by this means the Plaintiff desisted from his Suit, and the Defendant obtained the said Office: Wherefore the Judgment was affirmed.

Termino

Termino Paschæ,

Anno decimo nono JACOBI Regis
in Banco Regis.

Benson and his wife *versus* Hall and his wife.

Action for these words by the *Feme*, of the *Feme*, Thou (1)
perjured Beast, I will make thee stand upon a Scaffold in
the Star-Chamber. It was moved in arrest of Judgment,
that these words be not actionable, being spoken
adjectively, not positively, Thou art a perjured Beast: But it was
adjudged that the Action well lay; for the last words do not mitigate
the former, but shew what was her intent in these words.

Bothe *versus* Crampton.

Assumpsit: Whereas a Legacy of 40 l. was devised to the (2)
Plaintiff by J. S. who made the Defendant his Executor;
And that divers Goods came to the Defendants hands, and the
Plaintiff intended to sue him for that Legacy; That the Defendant
in consideration the Plaintiff would forbear his Suit, at such
a time promised to pay, &c. Upon Non assumpsit pleaded, and
found for the Plaintiff, it was moved in arrest of Judgment, that
the Declaration was not good, because he doth not aver that he
had *Affect* at the time of the promise: Sed non allocatur; For it
shall be intended he had, otherwise he would not have made such a
promise: Wherefore it was adjudged for the Plaintiff. *Ante 602. 4.*

Swadling *versus* Piers, Mich. 18 Jac. Rot. 49.

Ejectione firmæ of a Lease of Tythes; And doth not shew that (3)
it was by Deed: And because Tythes cannot pass without *Ante 272. 137.*
Deed; After Verdict for the Plaintiff, exception being taken for
this cause, it was ruled to be ill, and adjudged for the Defendant.

Hayton *versus* Wolfe, Mich. 17 Jac. Rot. 290.

- (4) **E**rror of a Judgment in the Common Bench: The Case was such, John Wolfe Administrator of John Aldrich, *de bonis non* administratis by John Talbot, Executor of the said John Aldrich, not administered by John Armiger (Administrator of the said John Aldrich) brings Debt upon a Bill of 40 l. against Hayton. The Defendant pleaded, that the said John Aldrich made the said John Talbot his Executor, who administered, and afterwards died, and made one Benjamin Roblet his Executor, Qui suscepit onus executionis testamenti of the said John Talbot, and administered divers of his Goods: Which Benjamin is yet alive. The Plaintiff replies, Quod bene & verum est, that the said John Aldrich made the said John Talbot his Executor, who administered the Goods, and afterwards died, and made the said Benjamin Roblet his Executor: But he further saith, that the said John Talbot did not prove the Will of the said John Aldrich: And that the said Benjamin Roblet, ante quod suscepit onus executionis testamenti of the said John Talbot, refused before the Ordinary, such a year, day, and place, to be Executor to the said John Aldrich, or to administer his Goods, as Executor unto him; And hereupon the Defendant demurred, and it was adjudged for the Plaintiff in the Common Bench: And now Error being brought, the Error was assigned in matter of Law; First, That the Replication is a departure from the Declaration, wherein he supposeth John Talbot to be Executor to John Aldrich; And in the Replication it is alledged, that he died before Probate of the Testament, so as he was never Executor, which is contrary to the Declaration: But it was thereto answered by Henden Serjeant, that it was not any departure, but stood well with the Declaration: For, in that he was named Executor by John Aldrich, he might before probate have administered, and when he died before probate, he died intestate, quoad being Executor to John Aldrich, and his Executor cannot be Executor to John Aldrich. Vid. 22 Eliz. Dy. 372. A second question was made, whether he might take upon him to be Executor of John Talbot, and refuse to be Executor of John Aldrich: And the opinion of the Court was with the Defendant in the Writ of Error, that the first Judgment should be affirmed; For as to the first, The Declaration is good, that he administered as Executor: And the Replication is not any departure; For that shews how he was Executor, quoad Administration, but not absolute Executor, because he had not proved the Will: And then, when he died without probate, the first Testator died intestate. Secondly, they held, that he might well assent to be Executor to the one Testator, and refuse for the other; and not like to the cases put of assigning Dower upon condition, or to assent unto Legacies conditionally, or to assent to one part of an Estate in a Legacy of a term,

or to an Attornment, to part and not to all : For these Wills are several, and therefore he may assent to be Executor to the one, and not to the other : Whereupon the Judgment was affirmed. Vide Co. lib. 9. fol. 41. Henflows Case, Dy. 367. 34 H. 6. 14. 44 Ed. 3. 16.

Amcotts versus Catherich, in the Exchequer.

TRESPASS by Quo minus in the Exchequer, for Lands in Penchard in the County of Durham : Upon Not guilty pleaded, and a special Verdict found at the Assises in Durham, the Case was such ; Baron and Feme Tenants in special tail, had Issue, the Feme dies, Matthew Amcotts the Baron makes a Dæd of Feoffment to the use of himself for life, and after to the use of Axelander his son in tail, and Letter of Attorney to make Livery : Before Livery is made, he takes Susan to Feme, and after Livery was made to those uses, the Baron dies ; The tenant endows Susan, who takes the Defendant to husband : And Alexander the Son enters, and brings Trespass : And whether this Dower was well assigned, was the question ; and argued at the Exchequer Bar two several Terms. The first question was, Whereas Baron Tenant in special tail with his Feme, having Issue by her, and she dies, and he taking a second Feme, makes a Feoffment, Whether this second Feme be dowable of this possession, and that the assignment of Dower unto her were good. Secondly, Admitting she were dowable, yet inasmuch as this Livery was made upon a Dæd of Feoffment, sealed before the Coverture, yet executed after, to the use of the Baron for life, whether she be now dowable : And it was resolved, and so adjudged, that she is not dowable ; for this Livery doth not gain unto the Baron any new Estate ; But being eodem instanti drawn out of him, it doth not gain unto him any seisin, whereof his Feme is dowable ; for at the first before his Feoffment, he had not any Estate whereof the Feme was dowable, being such a Tenant in tail, that his Issue by his second Feme could not inherit, 44 Ed. 3. 24. 46 Ed. 3. 24. Then when he hath not any Estate before the Feoffment, whereof the Feme was dowable, he hath not by his Feoffment gained any such Estate to make her dowable ; As where Tenant for life makes a Feoffment, as 3 H. 4. 6. or a Joyntenant make a Feoffment, as 34 Ed. 1. Dower 178. And Tanfield cited, that it was adjudged, where a married man took a fine, and by the same fine renoved the Land to another in tail, his Feme shall not be endowed thereof ; Because although he took it in fee, yet it is instantly out of him, Wherefore here, &c. And for the other point, it is not now questionable : Wherefore it was adjudged for the Plaintiff.

(5)

Co. Lit. 31. b;
40. a.

Co. Lit. 31. b;
1 Cr. 191.

Termo

Termino Trinitatis, Anno decimo nono JACOBI
Regis in Banco Regis.

Bythal and five others *versus* Harris.

(1)

Error by them fix, to reverse a Judgment in an Ejectione firmæ: The Defendant in the writ of Error pleads outlawry against one of the Plaintiffs: And it was thereupon demurred, because this is an Action not to recover any thing, but to restore them to what they lost, and to discharge them of damages and fines: But it was agreed, that if two Plaintiffs in Debt be barred, and bring Error, the Outlawry against one is a good bar against the other, for pursuing the Error because they be to recover. And Houghton held, that this was a good Plea in a Writ of Error, and relied upon the Book 33 Ed. 3. and that other books are direct in point: But Sir Ja. Lea, Doderidge, and Chamberlain *è contra*; For this being a suit by way of discharge, wherein he shall recover nothing; and they being enforced to joyn, because one of the Plaintiffs was a Defendant in the former Action; and if they had not joyned in Error the now Defendant might have named one who was outlawed, who was Defendant in the former Action, and should have joyned with them in this action, and so they never should have any remedy: And it would be very mischievous, upon an Outlawry in case of Error, Attaint, or Audita querela, which are only by way of discharge, if it should be any bar, this Writ being but a Commission; Wherefore they all agreed, that it was not any Plea: And therefore awarded, that he should answer to the Error. Vide Co. 6. 25. Ruddocke 29 Aff. 35. 35 H. 6. 17. 2 H. 4. 16. 1 H. 5. 14.

Ante 425.

Ante 117.

Sir William Reads Case.

(2)

Sir Will. Read being outlawed upon an Endicment for not repairing of a Bridge, was admitted to his Writ of Error, and moved to pursue it by his Attorney, and to put in Bail, and not to appear in person: But Fanshawe and all the Clerks of the Crown-Office affirmed, that none might assign Error upon an Endicment, but he ought to be in person, and put in Bail in person: whereupon the Court greatly pitying Sir W. Reads Case (because he was a person of 90 years of age, and infirm, and had kept his Chamber for infirmity for a year and more) conferred with the Attorney-General, how it might be done: But they all resolved it could not be admitted, being against the course of the Court; and doubted whether the Kings Privy-Seal would aid him: He was thereupon brought from his house ten miles from London in an horfiter upon mens shoulders, to the bar, and came into Court, and assigned his Error, and put in bail to prosecute, &c. And the Error assigned was, that he was named in the Endicment and Exigent, Willielmus Read miles de comit. Midd. whereas it should have been, de (such a place) in comit. Midd. alledging some place certain within the County: And for that cause the Outlawry was reversed.

Ante 610.

Termino

Termino Michaelis, Anno decimo nono JACOBI
Regis in Banco Regis.

Gardiner *versus* Norman.

Ejectione firmæ of a Lease of Sir Arthur Capell: Upon Not guilty pleaded, upon evidence to the Jury at the Bar, a lease by Indenture was shewn in evidence, in the name of Sir Arthur Capell and Elizab. his *Feme*, being the land of the *Feme*, which was signed and sealed by the *Baron* and *Feme*, and Letter of Attorney by the *Baron* and *Feme* to deliver it upon the Land in their names; and he delivered it in both their names: But because the Declaration was of a lease of Sir Arth. Capells only, and not in the name of his *Feme*, exception was taken; and Doderidge, Chamberlain, and Lea chief Justice, held, that the Declaration was good; For the delivery by the Attorney is a void Warrant, as to the *Feme*, and so it is the lease of the *Baron* only: But if the Lease had been delivered upon the Land by the *Baron* and *Feme*, it had been a good Lease for both, and he ought to have declared accordingly; But now it is the Lease of the *Baron* only, and not voidable, but void against the *Feme*: Therefore the Declaration is good. But Houghton Justice doubted thereof. Also they held, that where question was betwixt the Lord and Copyholder, where the Lord assesseth a fine of 12 l. to be paid by a Copyholder, and appoints it to be paid at this Capital Messuage of the Mannor three months after, and the Copyholder pretending the fine to be certain, (that is to say, two years quit-rent) offered at the day of assessement the fine, according to the rent for two years; but at the day appointed for the payment thereof, cometh not thither to excuse his non-payment, nor makes any other refusal, that in Law this is a forfeiture of his Copyhold: But if he had come at the day assigned him for the payment, and had then tendered the two years quit-rent, being the fine certain, due according to the custom, though not the fine assessed and demanded by the Lord, it had not been a forfeiture.

Ante 563.

1 Cr. 165.
Co. 3. 35. b.
Ante 417.

Rands *versus* Peck, Trin. 19 Jac.

Debt in the Detinet; For that the Defendant owed unto him 600 ⁽²⁾ ~~G~~ilders monetæ Poloniæ: And declares upon a Bill obligatory, wherein the Defendant was obliged to pay unto him 600 gilders of legal money Polonish, viz. ad valorem 220 l. legalis monetæ Angliæ: And that the Defendant had not paid unto him the said 220 l. monetæ Angliæ, nor the said 600 gilders monetæ Poloniæ; per quod actio accrevit, &c. The Defendant pleaded Non est factum, and found for the Plaintiff; And that the value of the 600 gilders Polish, was at the time of the Bill, and now 220 l. It was hereupon moved in arrest of Judgment, First, That the action ought not to be in the Detinet,

kkkk

Ante 88.

tinert, because it is upon a Bill obligatory : But it ought to have been in the Debet and Detinet. Vid. 34 H.6. 12.9 Ed.4.49. Book of Entries 157. & Mich.3 Jac. betwixt Draper and Raftall : Sed non allocatur ; For inasmuch as he is not to recover the Silvers, but the value of them found by the Jury, and the demand is not of any sum certain, and the value is not known to the Court, the demand is good enough in the Detinet. And Houghton said, that was the reason why an action against an Executor for the Testators debt (because it is not certain what sum he shall recover, but only according to the *Assets* he hath in his hands) shall be brought in the Detinet: So it shall be here, where the sum is uncertain, and not known to the Court, the action shall be brought in the Detinet only, and the certainty which he shall recover shall be made by the Jury : And therefore the Action is well brought. A second objection was, That the Action brought for the silvers Polonish, is an English and not a Latine word, whereas it ought to have been a Latine word, with an Anglice : Sed non allocatur ; Wherefore it was adjudged for the Plaintiff.

Hall *versus* Walland, Pasch. 19 Jac. Rot. 423. Leicest.

(3)

Error of a Judgment in the Common Bench, in an Assumpsit, where the Plaintiff declared, Whereas Will. Mabbs was possessed of such Land in Melton Mowbrey, pro termino diverforum annorum of the Demise of John Woodward Esq; And whereas there was communication betwixt the said Will. Mabbs and the Defendant for his Estate and Interest, the Defendant 27. Apr. 18 Jac. apud Melton Mowbrey aforesaid, in consideration the Plaintiff would procure the said Joh. Woodward to licence the said Will. Mabbs to assign his Lease and Interest to the said John Wolland, promised he would pay all his charges, and as much as he deserved for obtaining thereof, not exceeding 44 s. And alledges in fact, that he postea, viz. 27. Junii apud Melton Mowbrey prædict. procured the said John Woodward to grant this licence; and that he paid unto him therefore 20 s. and the ingrossing thereof cost 40 s. and deserved for his pains 10 s. And that the Defendant, licet requisitus, had not paid, &c. The Defendant hereupon demurred, and adjudged for the Plaintiff, and Error brought; The first Error assigned was, because it is not shewn in what County Melton Mowbrey was; so it doth not appear where the Land lies, nor where the promise was made: Sed non alloc. For Leicest. being in the Shire of Leicest. it is always intended to be the County where the Land lies, none other being mentioned. Vide Plowd. 253. 275. 39 H.6. 14. A second Error assigned was, because he sheweth not what term was to come, nor that he was tied with any condition to restrain him from alienation : Sed non alloc. For non refert how many years were to come, nor whether there was any such Condition ; For if the one will not buy, nor the other sell without licence, his procuring a licence is a sufficient cause, &c. Wherefore the Declaration is sufficient. Thirdly, Because he doth not alledge the day nor place where he expended these sums : Sed non alloc. For it is but a conveyance to the Action, and not traversable. Fourthly, That

Ante 96.
Hob. 263.

Post. 619.

That he alledges the promise to be, to pay tantum quantum meruerit, and avers, That he deserved 20 s. which is an uncertain and void promise; For it cannot appear what he deserved: And then entire damages being given, it is ill for this cause, and the Judgment erroneous for all: Sed non allocatur; For such promise to pay tantum quantum meruerit, is certain enough, and he shall make the demand what he deserves; and if he demand too much, the Jury shall abridge it according to their discretion: And in proof thereof two presidents were shewn, the one in Hill. 17 Jac. betwixt Ive and Chester, where a Taylor brought such an Action, and alledged a promise to pay tantum quantum meruerit, for the making of such garments, and recovered; the other in Hill. 11 Jac. betwixt Shepheard and Edwards, where a Physician brought such an Action upon a promise to pay tantum quantum meruerit, for such a Cure; and avers that he cured him, and deserved 100 l. And of that opinion was all the Court here: Wherefore the Judgment was affirmed.

Ante 360.

Ante 370.

Salmon *versus* Swann & alios, Trin. 19 Jac. Rot. 25.

Replevin: Upon Demurrer, the Case appeared to be, The King seised in fee of a Farm called Chalk-farm, anno secundo Regni sui, let it to the Earl of Northumb. and others for 100 years, if Frances Countess of Kildare, and wife to the Lord Cobham, should so long live, to begin after the death of Henry Lo. Cobham; and afterwards in the same year granted the Land in fee to Charles Brook, who 6. Dec. 4 Jac. let it unto Page for 21 years: Afterward in Octob. 5 Jac. the Earl of Northumb. and others the Lessees for 100 years, granted that term to the said Charles Brook, Nov. 5 Jac. Charles Brook granted a rent of 20 l. per ann. to Sir Tho. Trever and others, during the life of the said Frances, wife to the Lo. Cobham: Afterward Henry Lord Cobham died; The Defendant as servant to the Grantees of the rent, distrains upon Page the Lessee for this rent: And whether this Distress were lawful or not, was the question; and this rested upon the Lease for 100 years, whether it were in esse in Charles Brook, who had the Inheritance, and granted that rent, or if it were drowned in the Inheritance; For if it were not drowned, then it should avoid the Lease for 21 years, which was before this Rent-charge granted; and this term being in the Grantor who granted it, is liable to the payment of the rent: And it was resolved, That it was drowned in the Inheritance; For notwithstanding this Lease for 21 years, it is not so severed from the reversion, but by grant thereof to him who hath the Inheritance, the future term is drowned, and never shall rise again; and by consequence this rent shall not charge the possession of the Termier, who had the Estate before the Rent granted, and comes paramount it: Wherefore it was adjudged for the Defendant. Vide 14 H. 7. 2. 5 Ed. 4. 2. 5 H. 7. 38.

(4)

Moor *versus* Sir George Reignalls, Marshall of the Kings Bench.

Debt upon Escape against the Def. for suffering one Alsop to Escape, who was condemned in debt, and out-lawed after Judgment,

(5)

ment, and removed into the Kings Bench by Hab. corp. from Glocest. The Defendant shews, that he never was taken in execution. And that after he had b^een imprisoned for two years, he escaped: Whereupon the Plaintiff demurred. The first exception was, because the action was not brought tam pro Dom. Reg. quam pro seipso, for suffering an outlawed person to escape: Sed non allocatur; For he may bring his Action of Debt for what he hath lost; and it was certified by the Prothonotary, that the Presidents are both ways: Wherefore it was adjudged for the Plaintiff.

Cave versus Polewheel.

Ante 361.

(6)
Jones 14.

Ante 108.

1 Ro. Rep. 57.

Ante 135.

Ante 135.

Ante 384.

ERROR in the Ercheq. Chamb. of a Judgm. given the K. Bench, in debt for 600 l. A Sc. fac. was awarded ad audiend. errores, retornable 11. Maij, 18 Jac. And there was not any such day of adjournment in the Ercheq. Ch. And therefore it was held clearly by all the Justices and Bar. to be a discontinuance: And then it was moved, that the Pl. should have allowance of a new writ of Err. coram vobis resident. which was taken under seal, and certified: And it was resolved, that it lay not; for they have power to proceed by special Statutes, and they are directed by the Statutes, that they shall proceed upon a Writ. of Err. awarded to the chief Just. of the K. Bench, to remove the Record, & to reverse, or affirm, & then to remand; & they have not any power to award execution; But that is to be done in the K. Bench: So when the Pl. is non-suited, or the Writ discontinued, they have no more to do with it, but it shall be remanded, because they have not any Record before them: And if it should be permitted, that they should have a writ of Error, quod cor. vobis residet, he might oftentimes discontinue, and afterwards have another Writ of Error, and thereby infinitely delay the Pl. that he never should have execution; and by Law he ought to have but one Superfedas: And although a president was shewn, Trin. 33 El. Rot. 682. betwixt Gyddy and Sergeant Heale, where the Writ of Error was discontinued by the non venue of the Justices, & a new writ of Err. cor. vobis residet brought and discontinued, and afterward a second Writ of Error brought, and the Judgment thereupon affirmed: And another president Mich. 3 Jac. rot. 290. betwixt Hadright and Skirden, where a Writ of Error being discontinued, a new Writ of Error was brought coram vobis residet; and thereupon Error of infancy assigned, and found, and the Judg. was reversed: And although it was affirmed by Hopnill, who was late Clerk of the Err. that there were many presidents in that kind, yet all the Justices and Barons held, that these presidents were without debate: But for the reasons before, they would not allow this Writ of Err. and that it was not allowable by the Statute; for it is new Stat. and shall not be extended: And a president was cited to be betwixt Do. Tenant & Forest 14 Jac. where such a Writ of Err. coram vobis residet was brought, but upon debate disallowed: And it was said, they had not here the Record, but a transcript thereof; for the Record it self always remains in the K. Bench: And soasmuch as they may not award execution, they may not admit a Writ of Error, but according to the words of the Statute.

Sir

Sir Paul Tracy *versus* John Dutton, Hill. 18 Jac. Rot. 1036.

DEbt for 333 l. upon a Lease by Anne his wife dum sola fuit to the Defendant, rendring 570 l. per ann. at the Annunciation and S. Michael, with a Nomine Poenæ of 40 s. for every day the Rent should be arrear, after thirty days from any the said feasts: And shews, that marriage was had between them 1. Sept. 17 Jac. And afterward at Mich. 18 Jac. the rent of 275 l. was arrear; and that upon 29. Oct. 18 Jac. he demanded the rent: And for the rent of 275 l. and 58 l. for several sums forfeited, Nomine poenæ for 29 days, after the demand, the action was brought. Upon Non debet pleaded, a special Verdict was found, that the Plaintiffs wife 29. Sept. 18 Jac. demanded this rent of 275 l. of his son, who paid it; and that the Baron 29. Octob. 18 Jac. demanded the rent, and none was there to pay it; and that in 14 days after the payment, he heard thereof and dissented, and brought the action. The first question was, When a *Feme Covert* receives from her Lessee the rents, the Lessee not having notice of the Coverture, (For here it was not found that the Lessee had any notice of the marriage) whether this payment be good against the Baron? For it was agreed on both sides, If a *Feme* receive rents from the Tenants of her Husbands lands, it is not any payment, no more then a meer stranger; for she hath nothing to do by Law with the receiving of her Husbands rents. But whether this receipt of rent upon a Lease made by the *Feme* her self before the Coverture, (the Lessee not having notice of the Coverture) there being no countermand of the payment of the rent to the *Feme*, be good or no, was the question. And it was resolved by the Court, that this payment of rent to the *Feme* was no payment, but the Baron may well demand and recover it again. And although it were alledged, that the Lessee might peradventure pay it, not having notice of the marriage, (For it may be, the *Feme* being the Lessor came to demand it) and he being by condition or bond peradventure bound to the payment of his rent, paid it unto her who was his Lessor, in preservation of his estate or bond; and it would be hard to enforce him to pay it again, and be a dangerous case for Lessees, in proof thereof was cited 18 H. 6. 4. That payment to a *Feme Covert* Executrix is good; and Co. lib. 5. fol. 112. Mallories Case, 2 R. 2. Attorn. 8. Co. 8. 92.) Yet the Court said, that the Lessee is to do it at his peril, and the payment to the *Feme* is not material; for by such pretences *Femes Covert* should receive their Husbands rents without their authority, which is not allowable: wherefore for that point they resolved for the Plaintiff for the principal debt. Secondly, it was moved, that although this action lay for the rent of 275 l. yet it lay not for the sum demanded to be forfeited Nomine poenæ; And if it were good for the Nomine poenæ of 40 s. yet being demanded upon the 29. Octob. and no demand being alledged besides that day, it being a penalty upon every day, and as several Nomine poenæ, he ought therefore for every days forfeiture to have demanded

(7)

Co. 5. 27. b.

Hob. 28. 208. manded it : For without a demand, and Non-payment upon demand, there cannot be any Forfeiture ; vide Plow. com. 173. Co. 7. 28. Maunds case. New book of Entries, fol. 120. And of this point the Court doubted whether he might have any Forfeiture without express notice given ; and whether it be as a several penalty for every day, or as one intire penalty for all the days after the demand and non-payment, until the Defendant pleads payment or tender : They would not resolve ; whereupon Yelverton being of Council for the Plaintiff, said he would relinquish the penalties, and pray Judgment for the rent : And so, as to that point it was adjudged for the Plaintiff.

Hanbury *versus* Ireland, Attorney of the Kings Bench, Pasch. 19 Jac. Rot. 128.

- (8) **T**RESPASS by Bill filed Hill. 18 Jac. for that the Defendant, 20. Jan. 17 Jac. quendam Johan. Hawfield servant to the Plaintiff, did assault, beat and wound ; per quod le Plaintiff. servitium præd. Johan. per magnum tempus, scilicet à prædicto 20. Mart. 17. supradicto usque prim. Martii ex tunc prox. sequent. perdidit : Ac unum equum of the Plaintiffs ad tunc & ibid. cepit & asportavit, & alia enormia, &c. Judgment was given by Nihil dicit, and damages found, and returned to 10 l. upon a Writ of Enquiry : And now moved that the Plaintiff should not recover, but the Bill should abate ; For the Bill is brought Hill. 18 Jac. and the Battery is supposed 20. Jan. 17 Jac. and the loss of the service to be per magnum tempus, scil. à prædicto 20. Martii 17 Jac. usque prim. Martii following, which was in March 18 Jac. which is unto the time after the Action brought, and Damages are given for the time after the Action brought. But it was moved by Calthrop, that it was a mispission ; for it ought to have been from the foresaid 20. Jan. unto the first of March following, which was in Anno 17 Jac. and before the Action brought. But as it is, he moved, that it was well enough : For the battery is alledged to be 20. Jan. 17 Jac. which was good, and before the Action brought ; and the allegation per quod servitium amisit per magnum tempus, is good enough : Then the scil. à prædicto 20. die Martii which is a mispission for January) is idle and void. And compared it to the case 20 H. 6. 15. where a trespass was supposed with a continuando from the day of the writ, scil. such a day, (which was mistaken) yet it was well enough : And to the case of Tesmond and Johnson ante pag. 428. where the loss was 14. Maij, and the Crover the 15. Maij, Et quod postea scil. primo die Maij Anno prædicto be converted, which cannot be : And it was adjudged that the words after the scil. were void, and the postea was sufficient. So here, &c. But all the Court held, that in this case it was not good, nor is it aided by intendment nor amendable, nor like the cases cited : For there in the first case, the continuance unto the day of the Writ, was sufficient, and that appeareth upon Record, and the scil. is not material : So the allegation quod postea convertit is sufficient, and the scil. (which is repugnant) is idle, and not material.

But

But here the point of the Action is in the loss of his service, which ought to be shewn certainly, for that only enables him to the Action; and if the time certain be not expressed therein, the count is not good; and therefore the Scilicet and what comes after it, is material, which being ill alledged, the count is not good. Wherefore it was adjudged for the Defendant.

Charls Willis *versus* Shepherd, Trin. 19 Jac. Rot.

(9)

Action for words: Whereas the Plaintiff for twelve years last past was, and yet is servant to the Lord Arundel, and Steward of his Courts in the County of Dorset; And whereas for 30 years since, and yet, he is a Parishioner of Gillingham, and had been Churchwarden there for a year, and during that time, received 100 l. by reason of his Office, and made thereof a just accompt to the Parishioners there: And whereas he was Collector for the Poor there, and by reason of that Office received 100 l. and rendered thereof a true accompt: And whereas for twelve years he had been Feoffee there, of divers lands in the same Parish to the use of the Parishioners, and received of the profits thereof 100 l. and made thereof a just accompt: And whereas he was Steward unto the King of his Manor of Gillingham, and received 500 l. of the profits thereof to the Kings use, and thereof had made a just accompt. That the Defendant well knowing the premises, and to disgrace him, having communication with one Christoph. Kelloway brother in law to the Plaintiff, of his Offices which he had born in the said Parish, and of the sums of money which he had received, said these words: Thy brother in law *Charls Willis* is a notorious Lyar, and a Cozener, and hath deceived and cozened the Parishioners of *Gillingham* of 500 l. and he will teach thee to cozen me of my house; *ubi revera, &c.* And hereupon the Plaintiff had Judgment by *Nihil dicit*; and a Writ of Enquiry of damages being returned, before the filing thereof, It was moved in arrest of Judgment, That these words be not actionable: For the words Notorious Lyar and Cozoner are too general, and the addition of cozening the Parishioners, &c. is not material; For they be not such words whereof the Law takes consuance, nor to his loss of life or goods, or otherwise to touch him in his profession. And of that opinion was the whole Court, and remembred the Case of Sir William Brunckard of the Privy-Chamber, That such words were not actionable; and another Case of Seymour. But there they were not Officers, as here: Yet the Court held them to be all one. Wherefore it was adjudged for the Defendant, Quod Querens nihil caperet per Breve.

Ante 339.

Ante 429.

Trefwaller *versus* Keyne, Pasch. 19 Jac. Rot.

(10)

Asumpsit: whereas the Defendant 6. Apr. 18 Jac. in consideration the Plaintiff would travel with him from B. in the County of Devon to Lond. to help him to search for the Will of W. Stacy, that he would pay unto him 4 l. for his pains and journey; and alledges in fact, That he, viz. the Plaintiff, postea, scil. 15. Apr. 18 Jac. at the

the Defendants request travelled with him from B. aforesaid to London, and helped him to search for the said Will and found it, and that the Defendant had not paid unto him the 4 l. per quod, &c. the Defendant pleads and confesseth the promise; and that after the promise, and before that the Plaintiff had made any preparation for his journey, or made any search for the Will, viz. 16. Apr. 18 Jac. it was accorded and agreed betwixt them, that the Plaintiff should forbear his journey to Lond. and to assist him in the said search, and that the Def. should be discharged from the payment of the 4 l. and that accordingly he then and there discharged the Pl. of his journey and search. Upon this plea the Pl. demurred; and now this Term it was moved that the plea was not good, because where a promise begins upon consideration, it cannot be discharged by words only without some other consideration. Secondly, this agreement is alledged to be before any preparation for the journey, viz. 16. Apr. whereas the journey is alledged to be performed and executed 15. Apr. 18 Jac. which was the day before, and at the Defendants own request. But it was moved for the Defendant, That the scilicet 16. Apr. 18 Jac. is void, and to alledge the precise day is not material, but it sufficeth that it was before the preparation to the journey: Sed non allocatur; for the Court held, that the day of the journey being alledged to be 15. Apr. and he alledging the agreement to be 16. Apr. 18 Jac. it is not to any purpose, unless he had traversed that he had taken the journey before; but if he had taken Traverse, it might peradventure have been good: But Houghton held, That a promise may very well be discharged by words without any consideration. But for the other reason it was adjudged for the Plaintiff.

Ante 429.

Ante 202.

Ante 483.

16. 304.

Thomas Ashfield sen. *versus* King.

(11)

THOMAS Ashfield sen. being arrested in London and sued there in Debt upon an Obligation, was removed by Habeas corpus in the Vacation before Hilary Term, and putting in Bail one John Warden, King never declared upon that Bail, but declared against Tho. Ashfield jun. (who was also bound in that Bond) but no Bail being filed, he recovered; and Error thereof brought in the Exchequer-Chamber, where this was assigned for Error, and upon Certificate so certified: And it was now prayed, that this Bail may be filed for Tho. Ashfield jun. Sed non allocatur; for it appears upon the Hab. corpus, that it was taken for Tho. Ashfield sen. and it cannot be altered. Then it was moved, that the Plaintiff might declare this Term against Tho. Ashfield sen. and it was thereunto answered, that it could not be; for the course of the Court is, that none shall declare against any by reason of a Bill but within three Terms after the Bail filed; and the course of the Court is the law of the Court. Therefore it was referred to Dr. Brome the Secondary to call all the Clerks together, and certify what the course is in this point, who certified the usage for twenty years and more to be, That no Declaration shall be taken upon any Bail, but within 3 Terms after the Bail filed; and that the Lord

Popham

Popham in his time and the Court made an express Order accordingly; for before his time the usage was often otherwise. And the Court here held it to be a very good course, and that it should not be altered. Wherefore, because the Plaintiff had not filed a Bill upon this Bail in this Term, which was the 4th Term, they appointed it should be taken off the file, and that the Defendant should not answer.

Sir Charles Howard *versus* Sir William Cavendish and his wife,

Mich. 18 Jac. Rot. 453.

Error of a Judgment given in Dower, and in execution thereof. (12)
 The Error assigned was, whereas the demand was to be endowed of the third part of the Honor of Clun, and of 600 Messuages, 2000 Acres of land, &c. in Clun, and 23 other Towns, and of the Advowson of Hoxsey. And a Recovery by default: The Hab. fac. Seisinam was awarded with a Writ to enquire of the value, for that the husband died seised; whereupon the Sheriff returned, Quod habere fecit seisinam de tertia parte of the Honor, Hundredor. Tenementor, & Advocationis, viz. de uno tenemento five firma in Clun vocat. Weston ferm, tunc vel nuper in occupatione Willielmi Unton, &c. That it was uncertain; for a Tenement or Farm is uncertain. And therefore an Ejectione firmæ de messuagio five tenemento, is ill: so an indijment, that he entered into a Messuage or Tenement, was ruled to be ill. So in other places after, it is de 13. messuagiis five tenementis, cum terris, pratis, pascuis & pasturis eisd. pertinentibus, tunc vel nuper in tenura vel occupatione of J. S. and twelve other Tenants by Copy. Which was alledged to be uncertain for the cause aforesaid; and then being ill in this point, and damages found for all, it is ill, &c. And to that opinion Houghton Justice inclined: But all the other Justices held it to be well enough in assignment of Dower, because it is but the Return of the Sheriff, and needs not such precise certainty as in Declarations or Indijments: And therefore it was said by Lea Chief Justice, that Messuagium five Tenementum in tenur. J. S. is good and usual; and it would be infinite to set down here every of them by its self. But when he saith in the end, that he hath delivered them all by metes and bounds, it sufficeth. Vide Old Book of Entries 226, 230, 242, 245. and the New Book of Entries 271, 275, 276. It was also moved at the Bar, that the Judgment being good, as is confessed, and the Writ of Seisin well awarded, there is not Error in the Court in awarding Execution; And no Error can be assigned in the Sheriffs act in giving the Seisin and returning thereof: And of that opinion was Doderidge, unless it were as this case is, where Damages are to be enquired, and Judgment for them. So as if for any of them it be ill, then the recovery of the Damages being entire, it is ill for all. A second Error assigned was, because the Sheriff hath given the third part of the Advowson, & bona & catalla felonum, which are Franchises, whereof he is not dowerable. Sed non allocatur: For they held that the Return was good; for of an Advowson, if it be in gross or appendant, the is dowerable. Vide 13 Ed. 2. Dower 161. 17 Ed. 1. Ante 125. 1 Cr. 189. Post. 633. Co. Lit. 324.

ibid. 163. 11 Ed. 3. Dower 80. 15 Ed. 3. ibid. 81. And of Franchises, parcel of the Honor of Clun may be well assigned; and they may be parcel and appendant to the Honor, although they be not belonging to a Mannor which is of an inferior nature. Therefore the Judgment and Execution were affirmed.

Arundel versus Mead.

(13)

Ejectione firmæ, of a Lease from the Lady Morley of lands in the County of Essex; supposing that the Lady Morley, primo Maij, 14 Jac. demised them to the Plaintiff for five years if she lived so long, by force whereof the Plaintiff entered & suit inde possessionatus; And that the Defendant postea, viz. sexto Maij entered and ejected him à termino suo prædicto nondum finito, & adhuc extra tenet. The Defendant pleaded Not guilty, and found for the Plaintiff by a Jury at the Bar; and now moved in arrest of Judgment, that the Declaration is not good, because there is not any abatement of the life of the Lessor at the time of the action brought: For if she be dead, the term is determined, and he cannot have this action to recover the term. But Lea Chief Justice, Doderidge and Houghton held it to be good enough: for he shewing that the Defendant ejected him à termino nondum finito thereby implies that she is yet alive, for otherwise the term is determined; and relied strongly upon the Case 13 Eliz. Dy. 304. where in an Ejectione firmæ of a Lease, his supposition that the person adhuc seiscitus existit, implies his life: So here. But Chamberlain to the contrary: Because in an express limitation depending upon life, it ought to be shewn by express matter, and not by implication, that she was alive at the time of the action brought: And the words Nondum finito are in every Ejectione firmæ; and it seemeth that the case is the stronger, soasmuch as the Jury hath found him guilty. But the other Justices held that it was not material, for they find him guilty of the Ejectment at the time of the entry. But yet by the opinion of the three Justices, Judgment was given for the Plaintiff; and a Writ of Error being brought thereof, without much debate, the Judgment was affirmed, 15 Ed. 4. 6. 28 H. 8. Dy. 29. Plow. 31.

Hob. 208.

Moor 268.
Hob. 263.
Post. 637.

Boston versus Tatam Clerk.

(14)

Action for these words, That he was a Thief, and had stoln his Gold. After Not guilty pleaded and found for the Plaintiff, it was moved in arrest of Judgment, that these words be not actionable, That he was a Thief, &c. For it hath not any time when, and it may be, it was when he was a child, or in the time of Q. Elizabeth, or before, since which hath been divers general pardons, so as there cannot any loss happen unto him, nor any scandal, when the time is so incertain; for was intends the time past, and not, that he is so, at the time of the words speaking. Sed non allocatur: For it shall be intended to be maliciously spoken, and to discredit him. And it is a great slander to be once a Thief: For although a pardon may discharge

Ante 247.
I Cr. 317:

charge him of the punishment, yet the scandal of the offence remains; For, Poena potest redimi, culpa perennis erit. And it ought not to be intended that it was, when he was a child. Wherefore it was adjudged for the Plaintiff.

Porter versus Philips.

Assumpsit, 2. July, 1620. In consideration that the Plaintiff would lend unto him 7 l. 10 s. and would accept a Bond of Sir George Mannors of 80 l. and a Letter of Attorney to sue it, and would promise to release unto the Defendant all actions and demands; the Defendant assumed, that the Plaintiff could not recover from the said Sir George Mannors 40 l. within such a time, he would pay that 40 l. unto him upon request; And alledged in fact the lending unto him the 7 l. 10 s. and the acceptance of the Bond of 80 l. and the Letter of Attorney; And that he according to his promise, postea the same day and year released unto the Defendant all actions and demands; and that the Defendant had not according to his promise, (although he could not receive from Sir George Mannors within the said time, &c. & licet requisitus) paid unto him the 40 l. The Defendant pleaded Non assumpsit, and found against him: And now moved in arrest of Judgment, that the Plaintiff by this Release (which he himself hath shewn that he made the same day after the promise of releasing all Actions and Demands) hath extinguished this Action, and therefore by his own shewing hath no cause of Action. But all the Court held the Action to be well maintainable: For this Release is part of the consideration, and the cause which gives him this Action, and without making thereof, he could not maintain this Action: And although the Release is general of all Actions and Demands, yet that doth not discharge what is future, and whereof he hath not any cause of Action at the time of the Release made. Wherefore it was adjudged for the Plaintiff. Vide Clerk & Thomsons Case ant. & Cok. 5. 70. Hoes Case, Hill. 4 Jac. Rot. 577. betwixt Heycock and Field. (15)

Stubbs versus Cook.

Idemtitate Nominis: For that in a Replevin by Cook against Ralph Stubbs for Beasts taken, he made consuance as Bailiff to the Earl of Northumberland for an Amerciament in a Leet, whereupon they were at issue, and found for the Plaintiff, and Damages and Costs assessed, and Judgment given accordingly. He surmised that the suit was against Ralph Stubbs sen. and Execution being sued, the Sheriff had endeavoured to ledy the damages and costs upon the goods of Ralph Stubbs jun. Wherefore he sued this Writ to be discharged: and the Writ was allowed, although it were after Verdict, Judgment and Execution awarded. (16)

(17)
Jones 13.
Jones 254.
St. 11 H. 7. c. 24

Kynaston *versus* Lloyd and others, in the Exchequer.

EJECT. firmæ for lands in Boditham in Denbighshire of a Lease of Andrew Kynaston for three years. Upon Not guilty pleaded, and trial in the County of Salop, being the next County, upon a special Verdict, the case was found to be such: David ap Richards being seised in fee of the lands in question, (which were found to be of the annual value of 20 l. now, and at the time of the assurance, and) having only two daughters and coheirs, viz. Margaret and Mary; by Indenture betwixt him and John Kynaston 31 Eliz. covenanted with the said John Kynaston in consideration of marriage betwixt the said John Kynaston and the said Margaret, and in consideration of 115 l. to be paid by the said John Kynaston at such days, to assure those lands by fine to the use of himself for life, and after, to the use of the said J. Kynaston and Margaret, and the heirs of their bodies, remainder to the heirs of the body of Margaret, Remainder to the said Mary and her right heirs. The Assurance was made accordingly, and the marriage took effect. John Kynaston paid the 115 l. afterward the said J. Kynaston and Margaret had issue Andrew Kynaston, Lessor of the Plaintiff. The said J. Kynaston died; his wife Margaret takes a second husband, and aliens by fine to J. Lloyd the Defendant. And Kynaston enters for the forfeiture, and lets to the Plain. And whether this were an estate within the Statute of 11 H. 7. was the sole question; and it was several times argued at the Bar on the Plaintiffs part by Joh. Jeffery and Glanville, and by Serjeant Jones and Geo. Croke on the part of the Def. and much enforced on the Plaintiffs part, that it was within the words and intent of the statute, it being purchased by the Baron for a valuable sum of money according to the estate; for it is but a reversion expectant upon an estate for life of 20 l. per an. for which 115 l. is a sufficient consideration. But against, it was argued, that it was the land of the wives Father, so it is an Inheritance moving from the Ancestor of the Feme: And is in consideration of Marriage, which is intended the principal and original consideration: although there be payment of money, yet this is a real consideration, the other but personal, which is not regarded so much, and therefore it is out of the Stat. of 11 H. 7. Also it is as a gift in *Frankmarriage*, where the Donors have an Inheritance by those words so here: And of that opinion were all the Barons, that this is not any Joynture within the statute of 11 H. 7. because the land moved from the wives father and her advancement in marriage is intended to be the cause of the gift, and not the money: And this appears, because the limitation is to her and her husband in special tail, and after to the Feme in general tail, and for default of her issue, to her sister in fee; so as the father principally intended the advancement of his daughter: And although the Baron paid 115 l. that is not intended as a valuable price for the land, but to have the estate limited unto him as well as unto his Feme, so as he might have the lands, although he had no issue. Wherefore it was adjudged for the Defendant. V. Cok.

1 Cr. 244.
Ante 474.
Moor 93.
Co. Lit. 366.a.

lib.7. Bedels 40.a. & lib.9. 125. Plow.463,&464.Dy.248.And a case was cited 36 Eliz. in the Court of Wards; where Smith being seised of Lands of the value of 12000 l. by Indenture covenanted with Sir John Littleton, in consideration of marriage betwixt William Littleton Son of the said Sir John Littleton, and Margaret Daughter and Heir of the said Smith, and for 1300 Marks paid by the said Sir John Littleton, to assure the Lands to the use of himself for life, and after, to the use of Smith for life, and after to the use of William Littleton and Margaret, and the Heirs of the body of the said William on the body of the said Margaret, Remainder to the right Heirs of William Littleton; the lands being holden by Knight-service in capite. The marriage took effect, the Conveyances were made accordingly; Afterward Smith died. The question was, Whether this was a Conveyance within the Statute of 32 H. 8. for the advancement of his Child, that the King should have a third part; Or as a Conveyance for that money? (for then the King should have nothing.) And it was resolved, that it was a Conveyance within the Statute of 32 H. 8. although money was part of the cause, yet the principal cause by intendment was the Daughters marriage and advancement. Wherefore by advice of the Chief Justices upon a Case made and argued before them, It was resolved to be within the Statute, and a Decree made accordingly.

Webb *versus* Cook.

Prohibition to stay a Suit in the Ecclesiastical Court at Norwich for Defamation, and calling him Whoremaster, and say, (18) Antc 535: ing, That he had a Bastard. And shews, that the Defendant, who sued in the Spiritual Court, was sentenced for this cause of having a Bastard, and ordered to keep the Bastard, at the Sessions at Norwich; And notwithstanding they would examine this again in the Spiritual Court. And upon this suggestion the Defendant demurred. And it was adjudged, that the prohibition should stand: For, being sentenced to be the reputed father by the Justices of Peace at the Sessions, which is by Authority of the Statute-Law, It cannot be now impeached in the Spiritual Court, nor elsewhere; And all are concluded to say the contrary, until it be reversed.

Samms *versus* Mercer.

Debt against an Executor upon an Obligation of 40 l. the Defendant pleaded three Judgments in Debt in the Court of Rochester, and one Judgment in this Court, prout patet per Recorda predicta; and that he had not Assets to satisfy those Judgments. (19) Where-

Aure 18c.

Whereupon it was demurred. First, because he doth not say, prout patet per sepealia recorda, and conclude every of them severally prout patet per record in the said Court, &c. Secondly, It is not shewn what Sums he had in his hands to satisfie, so as the Court might know and adjudge thereupon. Thirdly, Because it is not averred, That they were vera & iusta debita whereupon the Judgments were given. And Doderidge held that it was ill for all those causes; But Houghton held it to be ill for the second cause; And the Chief Justice for the first cause, but not for the other; Chamberlain Justice was absent. Wherefore they all agreed, That for the one cause or other, the Plea was ill; and therefore it was adjudged for the Plaintiff. Vide Co. 9. fol. 109. Merial Treshams Case.

Arnold Waring *versus* Perkins, Hill. 17 Jac. Rot. 1047.

(20)

ERror of a Judgment in the Common Bench, where in debt he declared, That 5. Oct. 15 Jac. at London in such a Parish, the Defendant retained him quod aptaret & conficeret for him a Doublet and Hose, and for that purpose, That he bought so much Satten at such a price, and other things at such a price, & aptavit & confecit for him a Doublet and Hose, and deserved for his labour so much, which in all amounts to so much per quod Actio accrevit. The Defendant pleaded Non debet, and found for the Plaintiff, and Judgment given accordingly; and Error assigned by Bridgman; First, That he saith quod aptavit & confecit, and doth not shew the day nor place, and that is issuable. Secondly, Because he doth not shew that he delivered them to the Plaintiff, or was ready to deliver them. And for these causes upon the first motion all the Court (absente Lea) held it to be erroneous, and gave rule to have the Judgment reversed. But two days after, Coventry Attorney General, moved it again, and produced the hands of all the Prothonaries of the Common Bench, That Declarations in Debt are usually in that form, neither mentioning the day or place of the making. But in an Action upon the Case in an Assumpsit, they used to mention both: And the reason thereof (as Coventry urged) is, Because, in Debt the Defendant might gage his Law, and the time or place of the making shall not be traversed: But in an Action upon the Case, it is issuable, and therefore ought to be alledged. And to the second point, He ought not to alledge Delivery, but shall come on the other part, if he will bar him of his Action: For it was said, That a Taylor shall not be compelled to bring them home or deliver them, until he be paid for them, or be satisfied upon the delivery, and that is to be proved upon evidence. Wherefore for these causes the Judgment was afterward affirmed: And all the Court (Lea absent) mutata opinione held it to be well enough, especially after *Aerdict*.

Langley

Langley *versus* Payn.

Where the Verdict being imperfect, a Venire fac. de novo was awarded, and then a general Verdict given against both Defendants, whereby they were found guilty: And now moved in arrest of Judgment, that this is a void Verdict, at least as to the *Feme*: Because before, by the first Verdict she was found Not guilty, which appears upon the same Roll, whereupon the Venire fac. was awarded, and as to her the Verdict was perfect: and the Ven. fac. being awarded for the trial of that which was imperfect; the then finding here of the same Trespas, That she was guilty, where the contrary was found before, is mæly a void Verdict. And all the Court held, that the first Verdict was mæly void, by reason of the imperfection therein, and is as no Verdict, and all that is found therein is void, and not to be respected, although it be entred in the same Roll. Wherefore the second Verdict is good, being found upon better evidence: And it was adjudged for the Plaintiff.

Steward *versus* Coles.

Debt upon an Obligation of 1000 l. conditioned for the payment of 500 l. at such a day: the Defendant after imparlance pleads tender of the said 500 l. at the day and place of payment, and that none was there to receive, and that he is yet ready to pay. And thereupon the Plaintiff offered to demur, because he doth not plead *Tout temps prist*: And although he tendred it at the day, whereby he saved it for the time, yet if he doth not plead *Tout temps prist*, it shall be intended that he hath forfeited his Obligation; And whether he should have Judgment, or no, was much doubted. Therefore the Defendant durst not insist upon his Plea, but paid (by direction and mediation of the Court) in satisfaction of the said Debt, Costs and Damages, 100 l. besides the 500 l. Vide Dy. 300. This Plea held good, 21 H. 7. 74.

Sir Bernard Grenvile *versus* Sir Nicholas Smith, Executor of Sir George Smith.

Covenant. For that the Testator covenated by Indenture to pay for his Daughter Graces marriage with the Plaintiffs son 4000 l. at several days, And for non-payment of 400 l. at one day the Action was brought. The Defendant pleaded Non est factum Testatoris, and found for the Plaintiff, and damage found 420 l. and for costs 53 s. 4 d. and the cost increased by the Court to 12 l. And the Judgment entred upon the Postea was, Quod recuperet damna prædicta amounting to 432 l. de bonis testatoris, si tantum habeat in manibus, &c. & si non pro Misis præd. de bonis propriis, &c. But the entry of the Judgment upon the Roll was, Quod recuperet damna præd. attingent. ad 432 l. de bonis testatoris si tant. &c. Et si tantum in manibus suis non habet, tunc damna prædicta de bonis defendantis propriis: Where it ought to have been, Tunc Misa prædict. &c.

And

1 Cr. 410.574.
Post. 632.

Ante 135.

And hereupon Writ of Error was brought, and the Record removed, and the matter upon the Entry of the Judgment was assigned for Error; And now moved in the Kings Bench, that it might be amended; For there was not here any defect in the Court, nor in the Pronotary who signed the Judgment, but in the Clerk who entered it contrary to his Warrant; For the Entry upon the Postea was well, and that was his Warrant for entering it upon the Roll, which being entered otherwise is a mater default in the Clerk, and is amendable by the Statute of 8 H. 6. And of that opinion was all the Court upon view of the Postea, and upon examination, That it was so, before the entry of the Judgment: For it was awarded to be amended according to the Roll, and it was amended accordingly, although it were objected, That the Record was removed. But it was held, that the Record was not to be removed, but the Transcript thereof, therefore it might be well amended: And although the Record it self had been removed, yet it is usual in the Common Bench upon such a mispysion to amend the Record which is before them: And so if the Kings Bench will amend it, there shall not be several Records before them. Wherefore it was here amended. But afterward in Hill. 19 Jac. upon Diminution alledged in the Exchequer, a Cerciorari was awarded to certifie it; and after Diminution, it being certified according to the amendment, the Judgment was affirmed.

Termino

Termino Hillarii,

Anno decimo nono J A C O B I Regis
in Banco Regis.

Bennet *versus* Tabram, Mich. 19 Jac. Rot.

Action for words. Whereas Sir William Ayliff Knight (to whom the Defendant was servant) was robbed of divers goods by persons unknown; That the Defendant to scandalize the Plaintiff, spake these words, Thou art a maintainer of Thieves to steal my Masters goods, (innuendo the goods of the said Sir William Ayliff who was robbed) The Defendant pleaded Not Guilty, and found against him, and Damages 10 l. After Verdict, Serjeant Towse moved in arrest of Judgment, that these words be not actionable: For he doth not say, that he maintained them in the felony, nor knew them to be Thieves: And one may maintain Thieves, not knowing them to be Thieves. Sed non allocatur; For the words are to be taken in the most slanderous part, as he spake them. And Doderidge cited a case in this Court, Thou maintainest Pyrats who rob upon the Seas, adjudged that the Action lies. So here. Wherefore it was adjudged for the Plaintiff. (1)

Ante 59.268.

Eardley *versus* Turnock, Mich. 18 Jac. Rot. 1114.

Error of a Judgment in the Common Bench. The Error assigned was, because the writ original in the Common Bench (which was removed hither) was, That Eardley was seised in fee of a Messuage and sixty acres of land, 60 acres of meadow, and 80 acres of pasture in Heyton, And that he and all his Ancestors had had Common appurtenant in 200 acres of Waste, and that the Defendant had enclosed thre acres thereof, and disturbed him of his Common, to the Plaintiffs damage of 40 l. the Declaration supposeth it to the Plaintiffs damage of 100 l. So for this variance betwixt the Original and the Declaration, it was objected that the Plaintiff ought not to recover, but should be barred: For otherwise it was alledged, the King should be deceived in his Fine; and it is not a Trial without an Original, but it is an ill Original. But all the Court held, Although it had been a good exception in the Common Bench before the Plea pleaded, for the variance; yet now being after Verdict, upon Not guilty pleaded, the Jury finding but 12 d. damages, it is well enough, and not assignable for Error. But if the Verdict had found more damages then were comprised in the Writ, and less then is in the Declaration, yet it had been ill, and the (2)

M m m

Judgment

Ante 128.

Judgment erroneous; for there is not any Writ to warrant it: But when the damages are less then they be in the Writ of Count, it is otherwise. Wherefore it was held to be no Error at the Common Law, especially now upon the Statute of 18 Eliz. the variance not being in matter of substance or in point of the Judgment. Wherefore it was held by all the Justices to be well enough. A second Error assigned was, That the Declaration supposeth Common to 60 acres of land, 60 acres meadow, and 80 acres pasture; and the Verdict finds that he had Common to a Messuage, and 90 acres of land, meadow and pasture thereto appertaining; and for the residue, that he had not Common. So, as they have not found such Common whereof the Plaintiff counts, no more likewise do they shew the quantity of every the acres of the land, meadow and pasture respectively, but confusedly to 90 acres of land, meadow and pasture: wherefore this is not any such Common as the Plaintiff declares. Sed non alloc. For the Common is but the inducement to the action, and the substance is the Inclosure, which did the Tort; and if he had Common to more or less land, it had not been material in this action, or upon this Issue: But if it had been a special Issue whether he had Common for so much land, it might peradventure have been otherwise: Wherefore, &c. A third Error assigned was, Because the Judgment is, Quod defendens sit in misericordia; and also the Plaintiff in misericordia pro falso clamore, &c. for that land which is found against him. Whereas he ought not to have been in misericordia; for it is not material: As in action for words, when part of them are found for the Plaintiff that they be actionable, and part found against him, the Plaintiff shall not be in misericordia, because it is not material. Vide 6 Ed. 6. Dy. 75. But Doderidge and Chamberlain held it to be no Error; for, in as much as he declares falsly, although he hath cause to recover, he shall be in misericordia, because his complaint was false in some part. Vide Co. 8. fol. 62. a. Beechers Case. But Lea Chief Justice doubted thereof, wherefore he would advise. But afterward Pasch. 20 Jac. it was moved again the first day of the Term, and notwithstanding any of these Exceptions the Judgment was affirmed.

Ante 46.

1 Cr. 453.

Post. 636.

Sir William Pope *versus* Lewyns.

(3)

Action upon the Case, For that the Defendant 31. Maij, 19 Jac. had bargained with the Plaintiff to sell him a Mare, the Defendant atunc & ibid. sciens the said Mare to be lame, & variis infirmitatibus deficere, viz. with Spavins, Splents, & ad laborand. impotentem, Equam prædict. sanam & absq; aliqua infirmitate warrantizavit, & eandem Equam præd. 31. Maij, 19 Jac. pro 20 l. apud Lond. &c. eidem Willielmo falso & fraudulent. atunc & ibid. vendidit, & sic dictus Defend. fallaciter deceptit the Plaintiff of the said Mare to his damage, &c. The Def. pleaded Not guilty, and found against him; And it was moved in arrest of Judgment, That the Declaration was not good. First, because he doth not say warrantizando vendidit; for otherwise it may be, that the Warranty was at one time,

time, and the Sale at another time, although they both were in one day, and then the Action is not maintainable. And although the Presidents in the Book of Entries be in this manner, It was answered, That there it is Warrant. vendidit; which being shortly writ, may be expounded Warrantizando, which conjoyns it to the Sale: But as it is, it may be otherwise intended, and then the Declaration is not good. Secondly, this Declaration is uncertain, for want of the word (Et) after the Warrantizavit: For as it is, it is insensible. And of that opinion were Doderidge and Chamberlain; But Lea Chief Justice did not deliver any opinion: wherefore the Defendant appearing, the Plaintiff declared de novo.

Burbolt *versus* Kent and Anne his wife, Trin. 19 Jac. Rot.

& Mich. 18 Jac. Rot. 3081. in C. B.

Ravishment d' Gard, of one Edward Beetison, son and heir of one Edw. B. apud Swarley. For that the said Edw. B. the father held a Messuage and 20 acres of land in Swarley, and 20 acres of land in Thorp in the County of Lincoln of the Plaintiff, as of his Mannor of Swarley in the said County, by Knights-service, and died in his homage, his Heir being within age, viz. of the age of two years; And the Defendants ravished him, &c. The Defendants pleaded Not guilty, and found against them, and Judgment for the Plaintiff, and now Error thereof brought. The first Error assigned was, Because the Judgment is against them Quod capiantur, whereas there is not any Vi & armis in the Writ of Count; so the Judgment ought to have been in misericordia. Sed non allocatur; For being an offence against the Statute-law, the Judgment is well enough; Ante 348. And so are the Presidents in the Book of Entries 568. A second Error assigned was, Because the Ven. fac. was de Swarley, whereas it ought to have been de Manerio de Swarley where the Tenure is alleged, or from thence and Thorp where the lands lie. Sed non allocatur; For the Issue being Not guilty, the Ravishment being alleged to be at Swarley, the trial is well enough; But if the Issue had been upon the Tenure, it had been otherwise, for then it should have been of the Mannor and of the said Village. Wherefore notwithstanding these Errors, the Judgment was affirmed. I Cr. 162; Jones 9.

Mafon and others *versus* Fox, Stephenson and Thorp, Hill. 18 Jac.

Ejectione firmæ in the Common Bench, of a Lease of Robert Tyrwhit, Judgment being given for the Plaintiff, upon a Verdict: Error was thereof brought and assigned, because the Judgment was, Quod recuperet vers. Franciscum Stephenson possession of a Messuage, 60 acres of Land, 15 acres of Meadow, and 15 acres of Pasture; whereas the Verdict was entred, that he was found guilty of the Ejectment of a Messuage, 10 acres of Meadow, and 13 acres of Pasture, and for the residue Not guilty. So as there is not any land in the Verdict, and a lesser quantity of meadow and pasture than is in the Judgment; and it was moved that it was amendable; D m m m 2 able;

able; for it is the mispision of the Clerk, who ought to have entred the Judgment according to the Verdict, And the Paper-copy for entering the Judgment was right enough; So that the misentring of it upon the Roll was amendable by the Statute of 8 H. 6. But it was objected, that it was not amendable: for being in point of Judgment, it is always imputed to be the act and error of the Court, and not only the default of the Clerk. As where a Capiatur is entred for a Misericordia, or a Concessum est per Curiam, where it should have been a Consideratum est, &c. It hath been adjudged to be Error, and not amendable. And thereupon it was much debated whether it might be amendable: And all the Justices of the Kings Bench and Barons of the Exchequer were assembled to consider thereof. And they all agreed and resolved (besides Tanfield Chief Baron who doubted thereof, (upon divers Presidents shewn unto them) That it was amendable, and not like to the cases put: For the entry of a Capiatur for Misericordia is an error in point of Law, and cannot be imputed to the default of the Clerk, the Clerk having nothing to induce him either ways: But here the Verdict is the guide to the Judgment, and the Court directed the Judgment to be entred according to that Verdict; And the Judgment is but the consequent of the Verdict; and when the Verdict is before the Clerk to enter his Judgment, it is but his mispision that he did not enter it according to the Verdict, especially here, when the entry of the Judgment in the Paper is according to the Verdict, and the entry upon the Roll is in another manner and disagreeing from the Verdict; and so a meer mispision of the Clerk, and no default in the Court: wherefore it is amendable. And to induce the Court thereto, divers presidents were shewn, viz. Trin. 35 H. 8. rot. 53. Whitfields case. Where the Verdict was misentred contrary to the Notes, viz. Where in debt upon an obligation the condition was to deliver corn betwixt Christmas and the Annunciation, the issue being joyned upon performance of the condition betwixt the feasts aforesaid, and Verdict found for the Plaintiff, as appeared by the Note upon the doyle of the Writ, but the Verdict was entred, Quod non deliberavit the said corn ad Festa prædicta, and Judgment for the Plaintiff: And Error being brought, for that the Verdict was not found according to the Issue, because it afterwards appeared by examination, that the Verdict was well given upon the Issue, and was but a mispision of the Clerk, It was amended and the Judgment affirmed, Hill. 42 El. rot. 673. in the Kings Bench. *Stepneff vers. Joh. Morgan Wolf*, The Judgment was, Quod recuperet vers. prædict. Morgan in an action for words: And Error being thereof brought in the Exchequer-Chamber, and this matter assigned for Error; for Morgan is neither the Sir name or Christian name, but part of the Sir name; and although it were in the Judgment, yet being but the default of the Clerk in entering of the Judgment, it was ordered to be made Morgan Wolf, and the Judgment was affirmed, Pasch. 8 Jac. Rot. 525. *John Chelley vers. Stoten*, Assumpsit: Judgment was entred,

1 Cr. 442.3.

Anc 628.

3 Cr. 865.
Hob. 327.

entred, Quod prædictus Henricus recuperet, where it should be
 Prædictus Johannes recuperet; and Error brought upon this Judg-
 ment, and assigned in that point: Which being moved in the 1 Cr. 594;
 Kings Bench was amended, and made Johannes. And upon a Writ
 of Diminution, was so returned, and the Judgment affirmed, Mich.
 12 Jac. Rot. 1106. Nelson *versus* Skeits and his Wife, for words of
 the Wife; the Verdict was found for the Plaintiff, upon Not guil-
 ty pleaded, and the Judgment entred, Et prædict. le fem. in miseri-
 cordia, where it ought to have been, Quod prædicti le baron & feme
 ferront in misericordia, whereupon Error was brought. And for as
 much as upon Examination in the Common Bench, it appeared,
 that the Judgment was well entred in the Paper-Book; it was
 awarded in the Common Bench to be amended. And upon Dimi-
 nution alledged, it was certified, amended, and the Judgment af-
 firmed, Mich. 17 Jac. Rot. 2075. Sir George Sherley Baronet,
versus Underhil in a Quare impedit ad præsentandum ad Vicariam
 Ecclesiæ de—The parties being at Issue, it was found for the
 Plaintiff before the Justices of Nisi prius, in the County of War-
 wick, and Judgment was entred for the Plaintiff, Quod recuperet
 præsentationem ad Ecclesiam de—And thereupon Error brought, Hob. 327.
 because the Judgment should have been Ad Vicariam Ecclesiæ, and
 not Ad Ecclesiam; and it was held to be a manifest Error. But
 then exception was taken to the Writ of Error, because it sup-
 poseth the Record to be Inter Georgium Sherley Militem & Baro-
 nettum & Underhil; whereas Sir George Shirley never was Hob. 327.
 Knight, but a Baronet only; and it was held to be a manifest va-
 riance, and that the Record was not removed. Then it was moved
 in the Common Bench, that that Judgment should be amended;
 and so it was, by order there, which is a stronger case, that being a
 Judgment at the Assise. Vide 11 H.7.2. & 23. 21 H.7.31. 20 Ed.4.
 47. 22 Ed.4.46. 30 H.6.1. Co.8.62. See many more presidents of
 amendments in John Morgan Wolf. Case in Book 3. fol. 865.
 Pla. 44.

Ellis Case.

ENDICTMENT upon the Statute of 8 H.6. of Forceable Entry. (6)
 The first exception was, that the Inquisition was taken before
 A. and B. Justices of the Peace; and he doth not say, Nec non ad
 diversas felonias, transgressiones, &c. So they have not any power to
 enquire, Sed non allocatur. For upon this Statute, Justices of the
 Peace only; although they be not Justices, Ad audiend. & termi-
 nand. &c. have authority to enquire. Secondly, Because the entry
 is supposed, In unum Messuagium sive Domum, which was alledged
 to be incertain; as a Messuage or Tenement hath been ruled
 to be ill. Sed non alloc. For it was said, True it is, that an entry
 into a Messuage sive Tenement, is not good, because Tenementum 1 Cr. 189;
 is uncertain what it is; but Messuagium sive Domus are one and Ante 621.
 the same. Thirdly, For that the Endicament is, That he was
 Seifitus, sive possessionatus, which is not certain, Sed non allocatur;
 For

For it is of a Messuage five Domum, adhuc existent. liberum Tenementum, which proves, That he was seised of such an Estate, whereof he might be disseised. Wherefore the Endowment was good, and Ellis submitted himself to a Fine, &c.

Horseman *versus* Obbins, Mich. 19 Jac. Rot.

(7)

DEbt upon an Obligation of 100 l. conditioned, that if he save harmless, and indemnifie the Plaintiff and his Lands in Stretton, in the County of Surrey, (demised by one John Gray, and one John Beavis, by Indenture of such a date, during the term in the said Lease) from an annual Rent of 20 l. reserved upon the said Lease, during the said term, that then, &c. the Defendant pleads, Quod à tempore Confectionis scripti Obligatorii huc usque exoneravit & indemnem conservavit; the Plaintiff, and all the said Lands from the said Rent, Et hoc, &c. And it was thereupon demurred, because he doth not shew, Quo modo exoneravit & indemnem conservavit. For being a Plea in the Affirmative, he ought to shew how, that the Court might adjudge thereof: But if he had pleaded in the Negative Non Damnificatus, it had been good without further pleading; and of that opinion was the whole Court: Wherefore without argument, it was adjudged for the Plaintiff.

Ante 363.
Co. 2. 4. a.

Termino

Termino Paschæ,

Anno vicesimo JACOBI Regis in Banco Regis.

Harvy *versus* Chamberlain.

Action for these words spoken to the Father of the Plaintiff, Thy Son (innuendo the Plaintiff) hath murdered my Child. After Verdict it was moved in arrest of Judgment, that these words be not actionable, because it is not shewn that they were in Communication of the Plaintiff; nor doth he aver, that the Plaintiff was the only Son of his Father: 1 Cr. 177. Hob. 89. 252. For if he had more Sons, Non constat, of which of his Sons it was spoken; and every one of them may have an Action, as well as the Plaintiff. And neither the innuendo the Plaintiff, nor the Averment, that he spake them of the Plaintiff will serve; for it is but a general allegation of words, which do not import any slander to the Plaintiff. But if it had been spoken to the Son, Thy Father hath murdered, &c. it had been good enough; for there can be but one Father: So if it had been spoken to a servant or wife, Thy Husband and Master, &c. it had been good for the same reason; and of that opinion was the whole Court. Wherefore (absente Lea, Chief Justice) Judgment was given for the Defendant. Ante 107. Ante 444.

Francis Oily's Case.

Endicement before the Coroner Super visum Corporis of Francis Oily of Berks, who had slain himself with an Arrow shot out of a Cross-bow by himself; it was found that he in furore & insania shot himself with a Cross-bow Arrow, Dans eidem such a wound, in son gule of such a length, &c. whereof he died: It was removed into the Kings Bench by Certiorari. And now Coventry Attorney-General, moved for the reversal thereof; First, Because it is Juratores per Sacrament J. S. &c. and doth not say, Proborum & legalium hominum Comitatus prædict. Secondly, Because it doth not say, that he struck himself; which is the exception in the Endicement, in Longs Case, Coke 5. fo. 122. b. And for these causes the Court held the Endicement to be Vitious, especially for the first; and it was discharged upon that motion without day given, because it was said, they were very clear. (2) Ante 41.

Eardley

Eardley *versus* Turnock, cujus principium ante
page 629.

- (3) **I**N a Writ of Error, the Judgment being affirmed, Costs were taxed by the Clerk without motion in Court, which he conceived ought to have been given by the Court. But because upon suggestion in Court, that this Writ of Error was brought after Execution served, and so, not in delay of the Execution, (which appeared by examination; although it appeared not in the Record here certified,) it was held by all the Court, that no Costs were to be given; 1 Cr. 175. 401. For the Statute of 3 H. 7. doth not give any, but where execution is delayed by the Writ of Error: Wherefore the Judgment being of this term, it was appointed to be reformed, and a Superfedeas to stay the execution.

Smith *versus* Faldo.

- (4) **E**Rror was brought in the Erchequer Chamber of a Judgment given in the Kings Bench; and the Judgment affirmed, and 5 l. costs assessed Pro delatione Execution. And the Record being remanded, a Scire facias was sued against the Bail, to have execution against the Bail, as well for the principal Debt, as for the 5 l. costs assessed; and upon two nihil returned, and execution awarded against the Bail: It was now prayed to have a Superfedeas, because the Bail is not chargeable but with the damages and costs of this Court, and not with that which is taxed in the Erchequer Chamber: And of that opinion was all the Court. Wherefore a Superfedeas was granted to avoid the intire execution, and not only for the surplussage, as was prayed: For the Writ being entire, cannot be divided. Ante 99.

Smith *versus* Melfer.

- (5) **E**Rror of a Judgment in the Common Bench. The Errors assigned Ore tenus (which were insisted upon) because in Replevin Melfer made Conuſance as Bailiff to the Lady Wray: For that Sir Will. Wray her Husband was seized in Fee of the Mannor of S. And the Plaintiff held the said Lands of Sir William Wray by Fealty and 2 s. 7 d. rent, as his very Tenant, and made a Feoffment of the Mannor, to the use of himself and the said Lady his wife for their lives; and that Sir William Wray died, and for the rent of two years arrear, after the husbands death, the Distress was taken. The Issue was, that the Land was not within the Gift to the said Lady; and at the Nisi prius the Plaintiff was Non-suited. And Judgment being given for the Defendant, Error was thereof brought and assigned, because she entitles her self to a Rent-Service from the Plaintiff by a Feoffment of the Mannor, and doth not shew any Attoznmment. Sed non allocatur; For it is to be intended,

intended, where Feoffment of a Mannor is pleaded, that all necessary Circumstances, viz. Liberty and Attoynment, are performed: For otherwise it is no Feoffment of the Mannor. Secondly, That the Adowry is not good; for he made Conufance for Rent to a Lady, who is tenant for life, and doth not aver that she is alive: Sed non allocatur; for the Conufance being made in her right, it is sufficiently averred that she was alive; and there is not any president of such an Averment to have been made. It is also necessarily to be intended upon the Issue, which is Quod est & tempore quo Plaintiff. fuit infra feodum, &c. Which is a sufficient Averment, that she was alive at the time of the Conufance, and is necessarily implied in the pleading: As in the Case 13 Eliz. Dyer. Adhuc Seisitus, &c. Wherefore the Judgment was affirmed.

Ante 411.
Co. 8. 82. b.
Co. Lit. 303. b.

Ante 622.

Jackson versus Bell, Mich. 19 Jac. Rot. 177.

Replevin, The Defendant 'adovs for *Damage fesant* in his Freehold; The Plaintiff shews, that the place where, is parcel of a great field, called Wastesfield in Thriskby, and prescribes to have Common for a Messuage and two Acres in the said field Ubicunque & postquam blada & herbæ ibidem crescentia be reaped and carried away, quousque the said field or any part thereof be resowen. And that ante tempus quo & postquam the Corn in the said field was reaped and carried away from the said places, &c. He put in his Cattel Levant and Couchant upon his tenement, &c. to use, &c. his Common there, &c. And thereupon the Defendant demurred; first, Because he saith Ante tempus, &c. and doth not say in which year the field was sown, and the Corn carried away. Secondly, It is not shewn, that the said field or any part thereof was not resown; and then it is not within his prescription. Vide 10 Ed. 4. Dampont for the Plaintiff moved, that the Plea is well enough; for it shall not be intended to be resown, unless the other shews it, &c. But all the Court held, that the Plea is not good; for he being confined within what time he is to have his Common, ought to shew, that he is within the time; otherwise, it doth not enable him to use the Common: Wherefore it was adjudged for the Defendant.

(6)

Upchard versus Tatam.

Action sur Trover & Conversion, for that the Plaintiff, 9. Mar. 18 Jac. apud Chelmsford, was possessed of a Writing Obligatory, wherein John Petchy and Thomas Petchy were obliged to the Plaintiff in 60 l. sealed with the Seals of the said John Petchy and Thomas Petchy, Ut de Scripto suo Obligatorio proprio: Et sic possessionatus, 12. Mar. 18 Jac. lost it. And that upon 13. Mar. 18 Jac. at Chelmsford aforesaid, it came to the Defendants hands

(7)

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by

r Cr. 262.

by Crover : And that the Defendant, 20. Martij, 18 Jac. at Chelmsford aforesaid, converted it to his own use. Upon this Declaration, the Defendant demurred in Law, because the date of the Bond is not mentioned, nor that it was delivered as their Dæd ; but without much argument, it was adjudged for the Plaintiff : for he needs not shew the date, because it is lost, and the Defendant hath esloyned it. And he is not to recover the debt, but damages therefore. Secondly, The Allegation, that it was Scriptum Obligatorium wherein they were obliged, hath Intendment sufficient, that they delivered it as their Dæd. Wherefore, &c.

Termino

Termino Trinitatis, Anno Viceſimo JACOBI
Regis in Banco Regis.

Hunn and his Wife *verſus* Porter.

Action for theſe words, Chriſtian Hunn (the wife of the Plaintiff innuendo) is a Witch, and hath bewitched two of the Servants of J. S. to death. After Verdict for the Plaintiff, it was moved in arreſt of Judgment, that theſe words be not actionable, becauſe it is not averred, that any perſon is dead, nor in what matter ſhe was a Witch, Sed non allocatur. For the words, That ſhe is a Witch, are actionable. Wherefore Judgment was given for the Plaintiff. (1)

Bridges Caſe.

Bridges and others were endited pro eo quod, they entred into ſuch Land exiſtens liberum Tenementum of J.S. & manu forti diſſeiſed him: And becauſe the Enditment was not adhuc exiſtens liberum tenementum; and exiſtens liberum tenementum may refer to the time of the Enditment, and not to the Entry; Therefore the Enditment was adjudged to be ill, and was diſcharged. (2)

Waters *verſus* Bridges, Paſch. 18 Jac. Rot. 1894.

Error of a Judgment in the Common Bench in Debt, upon an arbitrement of 340 l. ſuppoſing there were Controverſies betwixt the Plaintiff and Bridges, and Eliz. his wife, for divers ſums of money, laid out for the ſaid Bridge's wife, at her requeſt dum ſola fuit. And that they ſubmitted themſelves in Arbitrement, as well concerning the premiſſes, as concerning all Suits betwixt them depending, touching the premiſſes: And the Arbitrators awarded concerning the premiſſes, That the Defendant ſhould pay to the Plaintiff 340 l. for all ſums of money laid out by the Plaintiff for Elizabeth, Dum ſola fuit, cum inde requiſitus eſſet. And that all Suits betwixt them ſhould ceaſe, Per quod actio acceſſit, to demand the 340 l. And that the Defendant Licet ſepius requiſitus had not paid the 340 l. Upon Non Debet pleaded and found for the Plaintiff, and Judgment thereupon, Error was brought and aſſigned, firſt, That the Declaration is not good, for the Arbitrement is void; Becauſe the Submiſſion is for all Controverſies concerning money laid out for the *Feme* at her requeſt, And the Arbitrement is, That he ſhall pay 340 l. for all ſums (3)

Ante 353.

Ante 183.
1 Cr. 35 385.
Ante 102.

laid out for the *Feme* (omitting at her request) so it is more then was submitted; and of that opinion was all the Court. Secondly, the arbitrement is to pay 340 l. Cum inde requisitus esset. So request being part of the agreement, there ought to be an express request alledged, and Licet sepius requisitus will not serve; and it is not like to Debt due upon a Bond or upon Contract: For there the Debt being due by Specialty or Contract, needs not a special demand, but Licet sepius requisitus will serve: But being due by Arbitrement, Cum requisitus fuerit, It is not due, but according to the Arbitrement upon special demand. And of that opinion was all the Court; wherefore the Judgment was reversed.

Maby *versus* John Shepherd, Executor of Edmund Shepherd.

(4)

Ante 558.
Post. 261.

Ante 221.

Ante 442.

Debt upon an Obligation for 40 l. by Edmund Shepherd: The Defendant demanded Oyer of the Deed, and of the Condition, which was entred In hæc verba, noverint universi per præsentem me Edwardum teneri, &c. in 40 l. And he subscribed it by the name of Edmund Shepherd, which was his true name; the Defendant pleaded Non est factum Testatoris. The Jury found that it was the Deed of the said Edmund Shepherd the Testator. And now it was moved, that notwithstanding the Verdict is found for the Plaintiff, yet the Judgment ought to be given against the Plaintiff: For he declares upon a Bond by Edmund Shepherd, and shews a Bond of Edward Shepherd, which is another person; and they never were the same, but distinct names. And although it be subscribed by the name of Edmund, yet that is no part of the Bond; which being apparant to the Court, the Plaintiff cannot have Judgment, but ought to be barred; and of that opinion was the whole Court. And although the Jury hath found it to be the Deed of the said Edmund, yet that will not help it, but he ought to have brought his Action according to the Bond: Wherefore it was adjudged, Quod quærens nihil capiat per billam. Vide Dyer 279. Shotbolts Case, and Watkins and Heliers Case, ante pag. 558.

Thomas Simpson and John Simpson *versus* Jackson.

(5)

1 Cr. 86.

Error of a Judgment in Durham. The Error assigned was, because in an Ejectione firmæ against Tho. Simpson the Father, and John Simpson his Son; the Father appearing by Timothy Commyn his Attorney, and the said John Simpson, Per eundem Timotheum Commyn, proximum amicum suum, who was admitted, per Curiam, pro eodem Johanne Simpson ad prosequendum, and pleaded Not guilty. Whereas he ought to have been admitted to plead by his Guardian, and not by Prochine-Amie; and the Admittance ought to have bin Ad defendendum & non ad prosequendum. But Dampont and Sir Henry Yelverton of Council with the Def. in the Writ of Error, moved, that it was not any Error: For Prochine-Amie is a Guardian, and a Guardian and Prochine-Amie be

be both one, when admitted per Curiam; and they be termed so in our Books both ways. And although the Entry is ad prosequendum, yet it is good enough; For the Defendant may prosecute a Ven. fac. cum proviso: So there is difference but in the terms only. And of that opinion was Chamberlain *puisse* Justice: But Lea, Doderidge, and Houghton to the contrary, that it is erroneous for both causes: For a Gardian and Prochine-Amie are distinct, and a Gardian or Prochine-Amie may be admitted for the Plaintiff; and the Prochine-Amie never was until the Statute of West. 1. cap. 47. and West. 2. cap. 15. And he is appointed in case of necessity, where an Infant is to sue his Gardian, or be esloyned, or that the Gardian will not sue for him. And for these causes he might be admitted to sue by Gardian or Prochine-Amie, where he is to demand or to gain: But when he is to defend a Suit in an action real or personal, it ought to be always by Gardian, and the Gardian ought to be admitted by the Court, who may answer his misleading if there should be cause, as 9 Ed. 4. 34. And therefore the Defendant ought always to appear by Gardian, and not by Prochine-Amie, as Fitz. N. Br. 27. H. And their Offices are several; therefore the admittance of the Defendant by Prochine-Amie is erroneous. Also to admit the Defendant ad prosequendum, is ill and preposterous. Therefore the Judgment was reversed. Vide 28 Aff. 11. 27 Aff. Dy. 56. & 104.

2 Inst. 267.

2 Inst. 267.

1 Cr. 86. 161.

Ante 441.

2. Sand. 95. 250. Shro. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

Termo

Termino Michaelis Anno Vicesimo JACOBI
Regis in Banco Regis.

John Mayor *versus* Richard Harre.

(1)

Assumpfit, For that the Defendant was indebted unto him in 40 l. Et sic indebitatus existens in consideration inde assumpfit solvere upon Request, &c. After Non assumpfit pleaded and found for the Plaintiff, it was moved in arrest of Judgment, That the Declaration was not good; For that he doth not shew for what cause he was indebted, so as the Defendant doth not know how to provide him an Answer. And it is not a promise in consideration of forbearance till such a day, or such a special promise; For that might be good; and to that purpose was cited Mich. 6 Jac. betwixt Buckingham and Coldes, That for this cause Judgment was reversed. And of that opinion were all the Court, viz. Doderidge, Houghton and Chamberlain, (absente Lea) and gave rule, That Judgment should be entred for the Defendant. Vide Co. 10. fol. 77. in the end of the Case of the Marshalsey.

Ante 213. 4.

Elborow *versus* Allen.

(2)

Action upon the Case. Whereas he was the Son and Heir of John Elborow and Anne his wife, daughter and heir of John Travel, and had divers lands by descent from them of the value of 200 l. per annum, That the Defendant envying his estate, speaking of the Plaintiff and Katherine his wife, said these words; Shall Elborow his wife sit above my wife? He is but a Bastard. Quorum prætenu he was much scandalized in his estate, & enforced to great expences to defend his title. Upon Nihil dicit, and writ of Enquiry of damages, and 50 l. damages found; It was now moved in arrest of Judgment, That these words be not actionable, because he doth not shew there was any speech about his estate, or that he was about selling or leasing out of the lands, nor that these words were spoken to scandalize his Title. And although the Plaintiff saith he was scandalized in his estate, and that they were spoken maliciously, That was but the Clerks drawing and inserting; For it doth not appear that he had any temporal loss thereby, and therefore not actionable, as Anne Davies Case is, Co. 4. fol. 17. But all the Court besides Doderidge held, that these words in themselves are scandalous and dangerous to cause his Inheritance to be questioned, & so the Plaintiff hath laid them to be in his Declaration, that he was put to great charges to defend his inheritance. But Doderidge strongly to the contrary; that neither the words themselves, nor the manner of speaking of them do import any slander but obliquely; and the

Ante 213.

Alle.

Allegation of the Plaintiff shall not help them. But the other three Justices being against him, it was adjudged for the Plaintiff.

Sir John Ferrers and Sir John Curson *versus* Sir Richard Fermor and others, Trin. 17 Jac. Rot. 246.

DEbt for 400 l. for the rent of two years arrear upon a Lease (3)
 of 21 years made to the said Sir Richard Fermor and others, rendering 200 l. per annum, of the Mannor of Belchingdon by John Poory, who after conveyed the Reversion to the Plaintiffs, who, for that the rent of two years was unpaid, brought the said Action, Upon Non debet pleaded, and a special Verdict, the Case appeared thus: John Poory let this land for 21 years, rendering 200 l. per annum; Afterward it was covenanted by Indenture betwixt the Lessor and Lessee and others, that a bargain and sale should be made, and a fine levied to the Lessee and to others and their heirs, to the use of them and their heirs, to the intent a Recovery should be suffered against the Conusees, with Voucher of the Lessee, who should vouch over the Common Vouchee, to the use of the Plaintiffs and their heirs. The bargain and sale was made by Deed enrolled, and a fine levied, and the next Term the Recovery suffered accordingly. And whether upon all this matter the term were extinguished, or in esse, was the question. For it was agreed by Council on both sides, and by all the Court, that if a fine or Feoffment be to Lessee for years, to the use of a stranger, it shall not extinguish the term: but it is saved by the Statute of 27 H.8. which executes the possession according to the Use, and saves all Rights. Estates and Interests. And as at the Common Law, if a Termor takes an Estate to Use, he shall not be compelled in Equity to execute the Estate, but his term shall be saved unto him: So the Statute doth not intend to prejudice such who have Estates, but to preserve them. But here the doubt was, because by the fine levied and Bargain and Sale made, to the use of the Lessee himself and others, for a time, to the intent a Recovery should be suffered; (The term being drowned and extinct for the time, until Recovery suffered) whether it shall now be revived? And all the Court resolved that it should: For the Bargain and Sale, the fine and Recovery, are all but one Assurance; and the Recovery being executed (which is grounded upon the Covenant) is quasi a Conveyance to the use, ab Initio; wherefore within the equity and intention of the Saving in the Statute: and is all one in Judgment of Law, as a Feoffment to an Use. Wherefore they resolved, That the term was not expired, but both term and rent were revived; And adjudged it for the Plaintiff.

Castle's Case.

One Innocent Castle was indicted, For that he took upon him (4)
 to be a Justice of Peace within the County of Buckingh. not having Lands to the value of 40 l. per ann. And sent his Warrant to
 to

3 Cr. 544.
1 Vent. 69.

to have one before him to find Sureties for the Peace, &c. Exceptions were taken to this Endicment: First, that the Statute appoints a Penalty, &c. which is to be recovered by Bill, Plaint, or Information, &c. therefore not by Endicment; And it was no offence before. And of this opinion was the Court, that when a Statute appoints a penalty for the doing of a thing which was no offence before, and appoints how it shall be recovered, it shall be punished by that means, and not by Indictment. A second Exception was taken, because it is not shewn that he had any Commission, or did any act by vertue of a Commission. And it was held also, that for this cause it was ill. Wherefore he was discharged.

Harflet *versus* Butcher, Trin. 20 Jac. Rot.

(5)

1 Cr. 107.
3 Cr. 44.

Covenant: For that the Defendant by Indenture upon a Lease made unto him of an house, covenanted, that he would from time to time during the term, after three months monition; sufficiently repair, and at the end of the term leave it sufficiently repaired to the Lessor, &c. And for not leaving it sufficiently repaired at the end of the term, the Action was brought; and shews in what parts, &c. Upon this, the Defendant demurred, because he doth not alledge, that he for three months before gave notice unto him of the defects, &c. But without Argument it was resolved, that the Declaration was good notwithstanding that exception; For the clause, To leave it well repaired at the end of the term, is distinct by it self, and doth not depend upon the former clauses: For he ought to leave it sufficiently repaired without notice, at his peril; And the notice within three months, refers only to the reparations within the term, whereto he is not tied without notice three months before. Wherefore it was adjudged for the Plaintiff.

Abbot and Alice his wife *versus* Blofield.

(6)

Ante 473:

Assumpsit, Whereas the Defendant received of the Plaintiffs money by the hands of the Plaintiffs wife, &c. That the Defendant in consideration thereof promised unto them to pay it at such a day, and alledgeth the breach for non-payment. The Defendant pleaded Non assumpsit, and found for the Plaintiff; and moved in arrest of Judgment, that this promise is void, being for monies of the Baron and Femmes: And ad damnum eorum cannot be; For a Feme Covert cannot have goods with her Baron. And although it were objected, that it may for monies due to the Feme dum sola fuit, or for Rent during the Coverture, It was held, that it shall not be so intended without it had been shewn. Wherefore it was adjudged for the Defendant.

Slater *versus* Stone, Hill. 19 Jac. Rot.

Covenant. Whereas he by Indenture let and demised an house (7)
in Barleyburlt to the Defendant for 21 years from Michaelmas
following, and the Defendant covenanted quod ab & post emenda-
tionem & reparationem dicti Messuagii by the Plaintiff, his Heirs
and Assigns, he at his proper costs and charges as need should re-
quire, bene & sufficienter repararet & sustineret, the said Messuages
during the said term, and so at the end of the term would leave
them well and sufficiently repaired. And alledgeth the breach, that
at the time of the demise, and beginning of the term, one Dove-
houle parcel of the premises was in good and sufficient reparations,
And that the Defendant voluntarie during the term suffered it to
stand uncovered for a year, whereby it became very ruinous, and
afterwards pulled it down, so as it became of no value. The De-
fendant pleaded, that he did not suffer it to stand uncovered, nor
pulled it down, &c. And thereupon they were at issue, and found
for the Plaintiff; and moved in arrest of Judgment, that the
breach is not well assigned: For the Covenant is, that ab & post
the Plaintiff hath repaired it, that he would maintain it in reparati-
ons. So the Defendant is not to repair it, until the Plaintiff hath
first repaired it. And of that opinion was the whole Court (absente
Lea.) And although it was objected, that the Plaintiff having al-
ledged it to be in good reparations tempore dimissionis & in initio
termini, needed not to repair it, when it was not necessary: But
that refers to all parts of the house which require reparation: Per
non allocatur: For the Court held, that the Covenant being, Quod
ab & post reparationem by the Plaintiff, then he would sustain, &c.
It is conditional, that the Plaintiff ought first to repair it. So al-
though it were in good reparation at the beginning, if it afterwards
happen to decay, the Plaintiff is first to repair it, before the De-
fendant is bound thereto. Wherefore it was adjudged for the De-
fendant.

Sir John Appesley and Sir John Key *versus* Ive.

Audita querela to be discharged of a Judgment in the Com- (8)
mon Bench in a Scire facias upon a Recognisance of 400 l.
in the Common Bench as Bail for John de Grise, wherein
they all were bound, that if the said John de Grise be condemned
at the Suit of the said Ive, he should either pay the Condemna-
tion, or render his body before such a day, (As the Bail in the
Common Bench is always in a sum certain according to the debt
or damages in the Writ; but in the Kings Bench there is not
any sum therein mentioned.) Judgment being given in the Scire
facias upon that Recognisance, Writ of Error was brought
upon that Judgment, and the Judgment affirmed; afterwards
a Writ of Error was brought upon the principal Judg-
ment, which was reversed. And hereupon Audita querela was
brought: For it was held by all the Court, that the first Judgment
D o o o reversed,

Co. 8. 143. a. reversed, is no reversal of the Judgment in the Scire fac. because it is a collateral Judgment by it self. But yet it was held by them, that it is good cause for an Audita Querela; For it is quasi dependant upon the first Judgment, and the first Judgment is the cause that he is charged by this Recognisance; And the cause of the Charge being taken away, it is reason the Bail should have their remedy to be discharged from the Execution upon the Recognisance, and the Judgment thereupon. Agreeable to the case put Co. 8. fol. 143. b. If a Recovery be in Debt against a Taylor upon an Escape, and afterward the first Judgment is reversed, the Taylor shall have an Audita querela. Vide the New Book of Entries 87. Audita querela by the Bail after Judgment against him for Debt, upon a Scire fac. because he was within age at the time of the Bail; and by the Audita querela he was discharged.

Heaton *versus* Harleston, Trin. 19 Jac. Rot. 85.

(9) **E**jectione firmæ. The Plaintiff declares, Whereas J. S. by Indenture 9. Jun. 19 Jac. dimississet, &c. suchland to the Plaintiff, Habendum terminum prædictum à die datus sigillationis & deliberationis Indenturæ prædictæ, for three years; virtute cujus, the Plaintiff 10. Jun. 19 Jac. entred and was possessed, until the Defendant the same day ejected him. The Defendant pleaded Not guilty, and found against him; And now moved in arrest of Judgment, That the Declaration is not good, because neither the day of the date, nor of the enfealing and delivery of the Indenture are mentioned, So as there is not any certainty in the Declaration when the term should begin. Sed non allocatur; For when the Verdict hath found him guilty upon the Declaration, and the Ejectment is alledged according to the Declaration, it may well be intended, that the Indenture bore date and was sealed and delivered the day mentioned in the Declaration of the Lease. Wherefore it was adjudged for the Plaintiff.

Ante 264.

Stamp *versus* Parker.

(10) **E**jectione firmæ. After Verdict at the Nisi prius for the Plaintiff, the Defendant at the day in Banco pleaded a Release from the Plaintiff betwixt the Verdict and the day in Banco, and shews it to the Court. And whether he should be received thereto, was the question: And resolved, that he had not any day to plead it, nor had he any remedy but by Audita querela, if the Plaintiff sued Execution. Wherefore it was adjudged for the Plaintiff.

1 Cr. 222.
3 Cr. 202.
Hob. 162.

Prescot *versus* —

(11)
2 Rol. 251.

Debt upon an Obligation with a condition to pay 140 l. the 15 day of May next ensuing, (the date of the Bond being the first of May:) And whether it should have relation to the month of May next following, and so a year after, or to the same month wherein the

the Bond was made, was the question : And adjudged it should be referred to the 15 day of the same month, being a fortnight after the date, and not to May in the year following. Wherefore it was adjudged for the Plaintiff. And this matter being moved in arrest of Judgment, That the Action was brought before the Obligation forfeited ; It was held, that Next following should refer to the day, and not to the month. And Error being brought, the Parties compounded.

Scavage *versus* Parker.

Ejectione firmæ of a Lease of Lucy Lady Griffin, 7. Jan. 19 Jac. (12)
by Indenture dated 6. Dec. 19 Jac. Habendum à die Datus Indenturæ prædictæ. Upon Not guilty pleaded, and Evidence to the Jury, the Lease was shewn bearing date 6. Dec. 19 Jac. and the Habendum was à tempore confectionis Indenturæ. And because à die Datus excludes the day, so as it is not the same Lease whereof the Plaintiff declares, It was held that the Plaintiff had mistaken his Action. Wherefore the Plaintiff was Non-suited.

Co. 5. 1. a. b.
Co. Lit. 46. b.

Chamberlain *versus* White and Goodwin.

Action for words : For that they two spake these words of the Plaintiff ; Thou hast the Plate of J. S. and we will charge thee with that Felony. After Verdict upon Not guilty, and found for the Plaintiff, it was moved in arrest of Judgment, That the action lies not jointly against them ; For the speaking of the one, is not the speaking of the other : wherefore they ought to have been severally charged. And it was thereupon adjudged for the Defendants. (13)

Calthorp *versus* Newton, Trin. 20 Jac. Rot.

Trespas. The parties being at issue upon a Ven. fac. awarded, twenty five were returned, and at the Nisi prius twelve of them were sworn, whereof the five and twentieth person was one ; And for this cause, it was moved in arrest of Judgment, and held to be an ill trial ; and not aided by the Statute of Jeofails. But the Court held, that although twenty five were returned, and twelve of the first twenty four had been sworn, and not the twenty fifth person, it had been well enough, and aided by the Statute : But as the case now is, it is a mis-trial, and not warranted to swear the twenty fifth person. Wherefore a Ven. fac. de novo was awarded. (14)

Cr. 224.

Bull *versus* Wheeler.

Error of a Judgment in Canterbury. The Error assigned and insisted upon, that in debt upon an Obligation against an Executor for the performance of Covenants in a Lease made unto the Testator, the breach was assigned in the time of the Executor (15)

for not repairing of an house; and Issue being found against the Defendant, Judgment was, Quod recuperet the Debt de bonis Testatoris, si &c. Et si non, tunc de bonis propriis. Where it was alledged, that in as much as this breach is declared to be by the Executor himself, and in his default, the Recovery ought to have bin as well for the debt as for the damages de bonis propriis: And a president was cited in the New Book of Entries to this purpose. But all the Court held, if there were any such president, it is not Law: For the Executor is chargeable in debt by the Covenant made by the Testator, and therefore shall be charged only for the principal with the goods of the Testators; and by no act or false plea shall he be charged de bonis propriis, but where he pleads the false plea Ne unq; Executor, which utterly ousts him from the benefit of the Testament. Wherefore the Judgment was affirmed.

Moor 70.
Ante 191.
Post. 672.

Burton *versus* Brown, Lessee of the Lady Platt.

(16)

Ejectione firmæ. Upon Demurrer, the Case was, That Sir Hugh Platt had a piece of ground or Garden-plot, and let it unto Juxon; afterward Juxon assigns this Lease to Ireland, and Ireland builds upon part of the Garden-plot two Houses, leading a sufficient Garden: And afterwards Sir Hugh Platt lets to the said Burton the Plaintiff, All that Garden-plot or piece of ground late in the Tenure of Juxon, and now in the tenure or occupation of Ireland. First, whether the Garden-plot and Houses then in the occupation of Ireland, Or only so much of the Garden-plot as was not built upon, passed, was the question. And it was held by all the Court, That all the Garden, as it was in the tenure of Juxon (although it was afterward built upon) did pass: For the Lessor doth not take knowledge what is done by an Under-tenant, and therefore by indentment leased it as entirely, as he first demised it to Juxon; And all which was in his occupation, and the Houses which were built after the Lease made, did well pass.

Stone *versus* Smalcombe.

(17)

Action for words. Whereas the Defendant being arrested by a Warrant made upon a Latitat, directed to the Sheriff of Middlesex; That the Defendant spake these words, This is a counterfeit Warrant made by Mr. Stone (innuendo the Plaintiff had forged that Warrant.) After Verdict upon Not guilty, and found for the Plaintiff, it was moved in arrest of Judgment, That these words be not actionable: For it is not alledged, That he forged any Warrant; Nor is it any forging within the Statute of 5 Eliz. But it was held by the Court, That the Action lies: For, in saying It was a counterfeit Warrant made by him, it is intended to be counterfeited by him, and a great slander. Wherefore it was adjudged for the Plaintiff.

Rowland

Rowland *versus* Doughty, Trin. 20 Jac. Rot.

Ejectione firmæ of a Lease from John Stringer and Fortune his wife, of Lands in Chaddeston, for three years. Upon Not guilty pleaded, a Special Verdict was found, That Henry Scatergood was seised in fee of one moiety in possession, and of another moiety in reversion, expectant upon the lives of John Scatergood his father, and Margaret his *Feme*. And so seised, made his Will in these words: I will, That *Fortune* my wife shall have to her use and occupation, All that my Living which I now do occupy, so long as she do keep my Name, until such time as my son J. S. shall come to the age of 21 years; and that then she shall have the Thirds of all my Living. *Item*, I will, That *John* my son shall have all my Lands in *Chaddeston*; and if he die without issue, Then I devise the same to my daughter. The Devisor dies, John Scatergood the father and Margaret the wife die; Fortune the *Feme* enters, and after takes to husband Tho. Stringer the Lessor: J. Scatergood enters, and infeoffs Charlton under whom the Defendant claims and occupied all: And Tho. Stringer and his wife entred, and made a Lease of the third part to the Plaintiff, who brought an Ejectione firmæ, And it was found, that the Devisor had not any Tenements but a Farm in Chaddeston, whereof the Land in question was parcel; and an actual Entry was found. And whether the *Feme* after his death shall have the third part of all; Or but the third part of the moiety which Henry Scatergood himself occupied; Or no part, because she married before the full age of the Heir, and so determined her own estate, was the question. And all the Court resolved, That she should have a third part of all, the words of the Will being well weighed: For the first words give all, which was in his occupation, which was the moiety of all, during the minority of his son, and if she kept his name, (i.e. if she lived so long a widow) by the words, All this my Living which I now occupy: And after marriage, or full age, That she should have the Thirds of all my Living: which extends to the reversion, and to the possession: for that clause is not referred to that which he occupied, but it is to his Living; and that which is in reversion, is in common parlance his Living, and is as much as if he had said, All his Farm. And this Devise to the *Feme* is not controuled by the words subsequent of the Devise to his son, having but that Farm or Living: And although she determines her first estate by marriage, yet that doth not destroy the subsequent Devise. Wherefore it was adjudged for the Plaintiff, that he should recover the third part.

(18)

1 Cr. 1307

Noyes *versus* Hopgood.

Debt upon an Obligation for Eighty pounds, conditioned for the performance of divers Covenants contained in Articles of agreement. The Defendant pleaded, that it was agreed betwixt the Plaintiff and the Defendant, that he should

(19)

1 Cr. 85. 193.
Ante 100.

should grant an Annuity of 5 l. out of such land for life, in discharge of that Bond: which Grant he made accordingly, and the Plaintiff accepted it in discharge of that Bond, &c. Whereupon it was demurred; And without argument, upon the first motion adjudged for the Plaintiff: For it is but a Concord and verbal agreement, which can never be a discharge of a Specialty.

Sir George Savile *versus* Richard Thornton.

(20)
Jones 11.

QUARE Impedit against the Bishop of Lincoln and Richard Thornton; for disturbing him to present to the Church of Barroughly, in the County of Lincoln, for that he was seised in fee of the Advowson of the said Church as in gross, and presented James Thornton, who was admitted, instituted and inducted; and by his death the Church being void, it belonged unto him to present, &c. The Bishop pleads, That he claims nothing but as Ordinary, &c. and Judgment against him. Richard Thornton pleads, That he is Parson *emparsonce* of the said Presentment of John Thornton, who is yet alive at B. aforesaid, And that the Plaintiff ought not to maintain this Action: For he saith, That long time before the Plaintiff had any thing to do with the said Advowson, the Prior of Okey was seised thereof in fee, and presented thereto Tho. Gooding, and after that granted the next Avoidance to R.M. and afterward surrendered his possessions to King H. 8. who was seised thereof in fee, and afterward the Church became void, and R.N. the Grantee of the next Avoidance presented thereto one Dickenson. That H.8. died seised, and it descended to King Ed.6. and from him to Queen Mary, and from her to Queen Eliz. who was seised thereof in fee in jure Coronæ; And the Church became void by the death of Dickenson, and she presented one Buttry; And that the Church became void by his resignation, and the Queen thereupon presented John King, who was admitted and instituted; And by his death the Church being void, the Plaintiff presented by usurpation the said James Thornton, who was admitted, instituted and inducted: That the said Queen Eliz. died seised, and it descended to the King who now is, who by his Letters Patents granted the next Avoidance to John Thornton, who by the death of James Thornton presented him, and that he was admitted, instituted and inducted; Et hoc, &c. The Plaintiff replies and takes protestation of the Seisin in fee of Qu. Mary, Queen Eliz. and the King who now is; And for plea, confessing the Seisin of the Plaintiff, and the Grant of the next Avoidance by him, and the Presentment thereby; and the Seisin of King H.8. and King Ed.6. And that King Ed.6. by his Letters Patents Anno quarto Regni sui granted that Advowson to Sir Tho. Wyat in fee, who granted it to the Plaintiff; and that Queen Eliz. made the several Presentments alledged in the count by Lapse; and afterwards the Church being void, the Plaintiff presented the said James Thornton, by whose death the Church being again void, it belongeth unto him to present: Wherefore, &c. And traverseth the dying seised
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of King Ed. 6. And thereupon the Defendant demurred: First, Because the Protestations are ill and repugnant. Secondly, The Traverse is not good: For he traverseth the dying seised of King Ed. 6. and doth not traverse the Seisin of Queen Mary and Queen Eliz. and their dying seised: Nor traverseth the Presentments alledged by reason of their Seisin in Fee, but answers them by reason of the Presentations by Lapse. And upon these points it was argued in the Common Bench, and Judgment given for the Plaintiff; And thereupon a Writ of Error brought, and the Error was here assigned in the matter of Law. And it was now this Term agreed, that this Quare Impedit is brought against the Incumbent without naming the Patron; and it is averred that the Patron is alive: And therefore the Declaration not being good, Judgment ought to have been against the Plaintiff. And in proof hereof were cited 3 H. 4. 2. 42 Ed. 3. 7. Co. 7. fol. 25. b. But it was thereto answered, That this peradventure might have been a good plea, if he had pleaded it in the Common Bench, and had relied upon it without pleading over, so as the Plaintiff might have answered thereto. But this can never be assigned for Error; For it is only to the Writ, and proves the Writ abatable, and it is not abated in fact; And nothing shall be assigned for Error concerning the Writ, but that which proves it to be abated in fact. Also this was not pleaded after the Impar lance: And for that he in his plea doth not rely thereupon, but hath pleaded another in bar, and so hath relinquished his plea to the Writ, and the Plaintiff hath not answered thereto: And then revera his plea in bar is not answered, when he doth not rely upon it, but pleads over in bar. And therefore it cannot be assigned for Error. Vide 13 H. 8. 13. 14 H. 8. 29. 22 Ed. 4. 35. 18 Ed. 4. 25. Secondly, It was strongly argued, that the Traverse is not good: Because he traverseth the dying seised of King Ed. 6. and doth not traverse the Seisin of Queen Mary and Queen Eliz. nor the Presentments alledged in the bar, by reason of the Seisin in Fee, it being the principal matter of the bar. But the Court held the Replication to be well enough: For, the dying seised is the principal matter traversable, the other matters are but consequents thereof; and the Plaintiff hath liberty to traverse any part of the Defendants plea. And the Presentments alledged are well confessed and avoided, when he shewed that they were Presentations by Lapse, and not by reason of any Seisin in Fee: And of necessity he was to answer unto them. And although it were objected, that Presentations cannot be answered by Collations made; And that Presentment by Lapse in the Kings Case is not any Collation, but a Presentation, and so always hath been pleaded; For he presents as Supream Patron. Vide 33 H. 6. 2. 7 Ed. 4. 20. Therefore Rule was given, that Judgment should be affirmed. But because it was alledged, that Sir George Savile Plaintiff in the first Action is dead pendant the plea, the Entry of the Judgment was stayed.

Hob. 5. 166.

Ante 44.

Arundel *versus* Gardiner, Trin. 19 Jac. Rot. 188.

(21)

A Sumpfit. Whereas the Defendant had a Fieri fac. for 61 l. of the goods of John Layer, and delivered that Writ to the Sheriffs of Norwich, to whom it was directed to execute, and affirmed to the Plaintiff, That the woollen Cloth in the Shop of Christopher Layer were the Wares of John Layer, and liable to Execution for the said Sum, and required him to execute it: That the Defendant *ad tunc & ibidem*, in consideration he would seize the said Cloth for the said Execution, assumed to the Plaintiff, That he would enter Bond to the Sheriffs of Norwich; when he should be required, in any reasonable sum, to save them and the Plaintiff harmless against all persons for entering into the said Shop, and taking Execution of the said goods: And alledgeth, That he giving credence to that promise, entered into the said Shop and took Execution of the said goods; And that for this cause Christopher Layer sued him in Trespas, and recovered 17 l. in damages and costs; And that the Defendant licet *sapius requisitus*, had not entered into any Bond to the said Sheriffs, &c. Upon Non assumpfit pleaded, and found for the Plaintiff, It was moved in arrest of Judgment, first, That this promise upon this consideration is against Law, to take Execution of goods which were not the Defendants, and to save him harmless against all persons; and therefore is not good, 2 H. 4. Sed non allocatur: For he shewing the goods, and requiring the Sheriff to do Execution, it is reasonable that he should save them harmless, and a promise to that purpose is good enough. A second Exception was, That this promise is uncertain to give Bond in a reasonable penalty, and it is not agreed what it should be, and therefore void. Thirdly, Because it is Licet *sapius requisitus*, he hath not entered into Bond; And he doth not shew by whom the request was made. Fourthly, Because he doth not shew that he tendered a Bond unto him: For he being to enter into Bond upon request, he who would have the Bond ought to make it ready and to require it, &c. Sed non allocatur: But Judgment was given for the Plaintiff.

Ante 102.
Cr. 386.

Post. 661.
Ante 102.

Termino

Termino Hillarii,

Anno vicesimo JACOBI Regis in Banco Regis.

Trefwell *versus* Middleton, Hill. 19 Jac. Rot. 965.

ERror of a Judgment in the Common Bench in debt for 42 l. 9 s 3 d. and declares upon several Accompts of divers sorts of Wares sold for divers several sums, and upon several retainers at several days to do several sorts of work; and among others, that he should retain one J. S. the Plaintiffs servant, to work with him for five days, capiendo pro salario suo, pro quolibet die 2 s. per quod Actio accrevit to demand 10 s. And so accompts of several Wares bought, and several retainers and several sums lent, amounting in toto to 42 l. 9 s. The Defendant pleaded Non debet, and found quod Debet 30 l. inde, & quoad residuum Non debet. And Judgment given for the Plaintiff, and Error thereof brought and assigned: First, because the Action lies not for the Master for the retainer of the Servant to work with the Defendant for five days; For it is not alledged that he did the service for his Master, but for himself; And the retaining is of the Servant for his own proper labour, and by a Contract with him: And if it were the retainer of the Servant by the command and appointment of his Master, he ought to have shewn that he retained the Master, and not the Servant; For then he ought to have counted accordingly, that he retained the Master, who by himself or Servant should work, &c. And of that opinion was all the Court. Secondly, the Action of Debt being for several parcels, the Jury finding that he owed 30 l. Et quoad residuum Non Debet, and not finding for which of the Contracts or Retainers Quod debet; (So as the Defendant cannot know for which he is condemned, and for which acquitted, and thereby might plead it in bar to other Actions, or have an Attaint if it be false.) For these causes the Verdict is not good, and the Judgment thereupon is erroneous: And of that opinion was the whole Court, (absente Lea) wherefore the Judgment was reversed.

Ante 31. 113;
Hob. 328.
Co. Lit. 227.^a.
Post. 662.

Bradford *versus* Ramsey, Trin. 17 Jac. Rot. 945.

ERror of a Judgment in the Common Bench in an Action upon the Case sur Trover. The Error was assigned, because William Brown of Harmthorn was returned upon the Venire fac. And upon the Distringas, one William Brown of Harmthorp was returned and sworn. So he was not the same person who was returned upon

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the Ven. fac. (And in truth there was not any ſuch Village as Harmthorn, as was in the Declaration) So it could not be amended. But all the Court (beſides Houghton) held, that the alteration of the name of the Village is not material: For a man may by indentment have two habitations, and may remove and alter his habitation after the Ven. fac. returned, which is not material nor examinable; but the trial is good enough, as it is in the Caſe betwixt Stanhop and Stanhop, quod vide ante pag. 457. But variance in the Chriſtian or Surname is material. Wherefore this was not allowed to be an Error. A ſecond Error was aſſigned, Becauſe the Writ was, Quod fuit poſſeſſionatus de diverſis bonis & catallis ad valentiam 20 l. and loſt them, which came to the Defendants hands, and he converted them. And the Writ doth not mention any goods in ſpecie; But the Declaration was, Quod fuit poſſeſſionatus de duobus cadis de Claret-wine, and one Hoghead of White-wine, and doth not mention any value. So the Writ and Declaration do not meet, nor doth it appear that the Declaration is founded upon this Writ. And when the Declaration varies from the Writ in ſubſtance, it is not aided by the Statute of 18 Eliz. And although the Statute helps where there is not any Original, or that the Original be varied in form, yet it doth not ſo where the Original varies from the Declaration in matter of ſubſtance; as it is held Co. lib. 5. fol. 37. Biſhops Caſe. Sed non allocatur; For they held, that Ad valenciam is not matter of ſubſtance in the Declaration; and being after Verdict, is aided by the Statute. Wherefore the Judgment was affirmed.

Ante 307.

Ante 130.

Royſton verſus Eccleſton.

- (3) **E**jectione firmæ de unâ domo & uno pomario, &c. After Verdict it was moved in arreſt of Judgment, That a Præcipe lieth not de domo, for non conſtat what it is; But he ought to demand Meſſuagium: And that a Præcipe lies not de Pomario, But he ought to demand it by the name of a Garden: So this Action which is to recover the poſſeſſion, ought to have been as certain as a Præcipe, and according to a Præcipe. Sed non allocatur; For it is but an Action of Treſpaſs in its nature; And therefore as Treſpaſs lies Quare domum fregit, or as Waſte lies de domibus, ſo this Action lies. And it hath been adjudged, That an Ejectione firmæ lies of a Cloſe, giving it a name. So here being a convenient certainty, ſo as the Sheriff may deliver poſſeſſion: And for the ſame reaſon, the Action brought pro Pomario is well enough: Wherefore it was adjudged for the Plaintiff.

Calthorp verſus Culpepper.

- (4) **T**reſpaſs of Aſſault, Battery and Wounding, ap. Illington in Com. Midd. After Verdict for the Pl. it was moved in arreſt of Judgment, that the Bill upon the file ſuppoſed the Battery in Lond.

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And the Bill was viewed in Court, wherein was supposed a Battery to be the same day and year at London. So the Bill is variant from the Declaration, and doth not warrant it. But the Court held, That being after Verdict, it is aided by the Statute of 18 Eliz. as the want of an Original Writ is: And this Bill in London, is as no Bill at all, for this Action brought and tried in Middlesex. Wherefore it was adjudged for the Plaintiff.

Ante 479.
Post. 675.
1 Cr. 272, 281.
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Buckley and his Wife *versus* Hale.

Trespas by Baron and Feme de clauso fracto of the Baron's, and for the Battery of the Feme, ad damnum ipsorum. The Defendant Quoad the clausum fregit pleaded Not guilty; Quoad the Battery, justifies. And for the first Issue, it was found for the Defendant; and for the second, for the Plaintiff. And now moved in arrest of Judgment, That the Declaration is not good, because the Baron joyns the Feme with him in Trespas de clauso fracto of the Baron's, which ought not to be: But for the Battery of the Feme they may joyn, whereto all the Court agreed. But it was moved, That in regard it was found against the Plaintiffs for this Issue in which they ought not to joyn, and the Defendant is thereof acquitted; and the Issue is found against the Defendant for that part wherein they ought to joyn: This Verdict hath discharged the Declaration for that part which is ill, and is good for the residue. As in 9 Ed. 4. 51. Trespas by Baron and Feme for the Battery of both: The Defendant pleaded Not guilty, and found guilty, and damages assessed for the battery of the Baron by it self, and for the battery of the Feme by it self; and Judgment was given for damages for the battery of the Feme, and the Writ abated for the residue. And of that opinion was Lea Chief Justice, and Doderidge: but Houghton and Chamberlain è contra; for the Declaration being ill in it self in substance, the Verdict shall never make it good. Per quod Adjornatur, &c.

Ante 479.
Post. 664.

Gilbert *versus* Witty and others, Trin. 19 Jac. Rot. 258.

Ejectione firmæ. Upon a Special Verdict the Case was: Robert Collard was seised in fee of three Houses in Norwich holden in Socage, having issue three sons, John, Robert and Richard; and devised one of those Houses, called the Star, to John and his heirs for ever, and he to enter at his age of 22 years; and devised his second House, which he purchased of Robert Maihn, to Robert his son and his heirs for ever, and he to enter at his age of 22 years; and devised his third house, which he purchased of Lettice Payn, to Richard his son and his heirs, & he to enter at his age of 22 years: Provided always, That if all my said children before named shall depart this present life without issue of their bodies lawfully begotten, that then all my said Messuages shall remain and be to Margery my wife and her heirs for ever. It was found, that John and Robert died without issue; and that afterwards Richard had issue, Martha wife to Philip Day

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Hob. 332

Post. 695.

the Lessor : That Margery entred into the House devised unto Robert, and let it unto the Defendant ; and afterward Philip Day entred, and made the Lease to the Plaintiff. Et si, &c. So the sole question was, Whether by the death of Robert without issue, there be a Cross-remainder by Implication given to Richard and the heirs of his body, Or whether Margery shall have it presently by the death of Robert without issue, or that she should expect until all the sons were dead without issue? For it was objected, that the intent of the Devisor was, That this *Feme* should not have any thing, until all his sons were dead without issue; For it is, If all his Sons die without issue, that then his *Feme* should have all his Houses : So it was not his intention, as long as any of his sons had issue, that his *Feme* should have any of his Houses. So by Implication the Sons should have a Cross-remainder the one after the other. And to prove it, the Case in 13 Eliz. Dy. 303. Where a man having issue five sons, his *Feme* *enseint*, devised lands to his four younger sons, and to the child that the *Feme* was *enseint*, if it were a son, and their heirs : And if they all died without Issue-male of their bodies, or of any of them, that the Lands shall revert to his right heirs ; It was held, that no part shall revert, as long as any of them had issue. And upon the Case of 16 Eliz. Dy. 326. Huntley's Case. But after divers Arguments of both sides at the Bar, Doderidge, Houghton, and Chamberlain delivered their opinion seriatim, That the *Feme* should have it immediately after their several deaths, as they died without issue; And that there is not here any Cross-remainder of any of those Houses from the one son to the other, because being a Devise to them severally by express Limitation, there shall not be any greater estate unto them by Implication. And although the estate be limited at the first to them and their heirs, yet it is abbreviated and made an estate several in them for the several Houses ; but none of them hath a remainder in the Houses of the other. And in proof hereof was relied upon the Book 1 & 2 Eliz. Dyer, Frecham's Case 171. & Dy. 330. Clache's Case, & Co. 5. fol. 7. Just. Windham's Case. And Doderidge said, although peradventure a Cross-remainder may be by Implication, where a Devise is of lands to two several persons; yet it cannot be by Implication without express Limitation, where the Devise is of three or more several Houses to three or more several persons : For when one dies, there cannot be several estates by moieties to several persons; and afterward when the second dies, to have a Remainder again to another. So for the Incertainty and Inconvenience, it cannot be : Nor was it ever seen in any Book, where an estate is limited to divers, that there can be a Cross-remainder. But Lea Chief Justice doubted, because it is in a Will ; And it was not the Testator's intent to prefer the *Feme*, as long as he had issue of his body. But for the reasons of the other Justices, they having long considered thereof, resolved, That it could not be a Cross-remainder. And so it was adjudged for the Defendant.

propter necessitatem v. Saunders Rep. 165.

Butler

Butler *versus* the Lady Swinerton.

Covenant against the Lady Swinerton, Executrix of Sir John Swinerton. The Plaintiff counts, that Sir John Swinerton in 8 Jac. let unto him the Mannor of Birch-Hall in Essex for 21 years, and covenanted, that the Plaintiff should quietly enjoy it during the term, without the let or disturbance of him, his Heirs or Assigns, or of any other person, by or through his means, title or procurement: And shews for breach, that in 5 Jac. the Lord Peters by fine granted that land to the said Sir John Swinerton and to this Defendant his *Feme*, and to the Heirs of the said Sir John Swinerton; And that this fine was so levied by the means and procurement of the said Sir John Swinerton; And that afterwards he made that Lease in 8 Jac. to the Plaintiff, who entered; and afterwards Sir John Swinerton made the Defendant his Executrix and died, and the Defendant ousted him, and so hath broken the Covenants, &c. It was thereupon demurred, and objected, that this Title which the *Feme* claims is not by any title or means derived from Sir John Swinerton, nor by his Conveyance, but by the Lord Peters; So as she hath the Estate immediately from him, and she surviving, shall plead it as an immediate Estate to her self. And this Covenant doth not extend to titles paramount the *Baron*, but to titles derived under him, and after his Estate created. Vide 14 E. 4. 1. Dy. 153. That the Survivor shall plead an Estate made unto himself only, 26 H. 8. 3. 22 H. 6. 52. Dy. 42. But all the Court held, that in regard there was an Averment, although she claims by the Conufoz, yet she is in, and claims by the means of her *Baron*, the Lessor; (for if the *Baron* had not procured the fine, she should not have had any Estate;) And therefore she is a person within the Covenant who claims by his means, although she claims by title derived from another: And there was not any disturbance by his procurement, because it was after his death. Wherefore it was adjudged for the Plaintiff.

Whiting *versus* Sir George Reynel, Marshal of the Kings Bench.

Debt for 202 l. Whereas he recovered against Tho. Abindgon and Mary his wife, in trespass for damages, 202 l. and the said Mary was committed in Execution to the Defendant upon this Judgment; That the Defendant 24. Nov. 16 Jac. suffered her to go at large whither she would, his debt not being satisfied, per quod Actio accrevit. The Defendant pleaded, that she brake prison and escaped, and he freshly followed her & took her again 21. Oct. 17 Jac. in fresh suit, and had her in Execution, and yet hath her, &c. Whereupon the Plaintiff demurred: And it was now argued, that this Plea was not good; Because the Escape is alledged 24. Nov. 16 Jac. and the Action is brought Pasch. 17 Jac. And this Repisal is alledged a year after the Escape, & after the Action brought. for it was alledged, although a Repisal by fresh-suit (if it had been before the action brought) would peradventure have excused him; yet being after the action brought, so as the Plai. at the time of the action brought had good

good cause to have the action, the Repifal after shall not excuse him: and compared it to waste brought for reparations, which if amended pendant the writ, it shall not excuse him. So here. And in proof thereof were cited, Co. 3. f. 52. Ridgwey's case, 23 Ed. 4. 8. 13 E. 3. tit. bar. 253. But againſt it was argued, that this Repifal, being alledged to be by freſh ſuit, and before the plea pleaded, is good for the time, and he ſhall take advantage thereof to excuse the Escape: For it is upon the matter no Escape, when ſhe was taken by freſh ſuit: for that is a continual purſuit, and the Law ſhall adjudge her in priſon alwayes. And it is not like the caſe of waſte: for there nothing was done after the waſte committed, before the action; & the Reparation hath not any relation, nor is the continuance of any former act: But this Repifal hath relation, & makes it as no Escape ab initio. As a diſtreſs taken for rent, and reſcued & given into another Manor, which is purſued & retaken; the party ſhall make his Abovvy of the taking in the firſt place. So here. And it would otherwiſe be a great miſchief, if an escape ſhould be againſt the wills of Sheriffs or keepers of priſons, by breach of priſon, or reſcuing themſelves before they be brought to priſon, or in their going thither; & the priſoners be repiſed within two or three days; that an action ſhould be brought in the interim againſt the Goaler, and that this Repifal (when he hath the priſoner before the plea) ſhould not be an excuse: Eſpecially to the Maſhal, who hath multitude of priſoners, & every day is to bring them unto the Hall by Hab. corp. or rules of Court: If peradventure a priſoner escapes, and an action be brought againſt the Maſhal the ſame day, before he can have any time to retake him; if he ſhould not be excuſed by the retaking, he would be charged with a multitude of ſuits, & could not have any remedy to excuse him. And therefore it was compared to the pleading of a fine levied, before the writ of Formedon & Proclamations incurred, pendant the writ, before the plea pleaded, he well may take advantage thereof by pleading it, although when the writ was brought, it was not compleat, nor could be pleaded. V. 6 H. 7. 12. Secondly, It was moved, admitting this to be no plea, yet the action lies not here, becauſe the Escape is of a *Feme-covert*, where her Baron is ſubject to the Execution: So the Pl. hath not loſt his debt; for by intendment ſhe might not have paid it, if ſhe had lain in priſon; for ſhe had nothing but what was her huſbands, & the execution remains yet againſt him. Therefore action of debt lies not, becauſe he is not totally deprived of his debt: but an action upon the Caſe, in reſpect of the damage. And therefore it was ſaid, If one hath Execution of a Stat. of the lands, goods, & body, &c. and the priſoner escape; yet becauſe the land remains in Execution, Debt lies not for the Escape, but an action upon the Caſe: for at the Common Law, an action of debt was not maintainable for an escape; but it is given by the Stat. of 1 R. 2. where the Debtor escapes. But here the ſole and principal Debtor did not escape; for the Baron is the Principal, and remained ſubject to the Execution. V. 33 H. 6. 47. N. Br. 93. Regiſt. f. 98. 4 H. 6. 6. wherefore, &c. But the Court held, that this was not any plea, becauſe the

the Action is brought, & implies a voluntary permission *ire ad largū*, which is neither denied or traversed. And if the Sheriff voluntarily lets a prisoner at large, he cannot retake him. And so this Repisal, as is alledged, being after the action brought, is to no purpose, nor is any plea. And for the action of Debt, they held, that it well enough lies, or an action upon the Case, at his pleasure; Because the *Feme* was only committed to prison, and not the *Baron*; And she is the sole Debtor, who is imprisoned. Wherefore it was adjudged for the Plaintiff.

Hob. 202.

1 Vol. 217

Powfely *versus* Blackman, Trin. 18 Jac. Rot. 1230.

Ejectione firmæ of a Lease of Richard Perryman of Lands in Thaitilcan. Upon Not guilty pleaded, a special Verdict was found, that John Curle was seised of this Land in fee; and by Indenture 7 Jan. anno 10 Jac. enrolled within six months, bargained and sold the Lands to William Perryman in fee for 300 l. with a Proviso, that if he paid to the said William Perryman 300 l. in this manner, viz. 10 l. upon the 9. of July following, and 10 l. upon the 9. of Jan. following, and so for nine other payments upon the said days, and upon the 9. of January, 1617. should pay unto him 210 l. that then the Bargain and Sale should be void. Proviso etiam & agreeatum suit betwixt the said parties, that the said William Perryman, his heirs or assigns should not intermeddle with the actual possession of the Premises, or perception of the Rents thereof, until default of payment were made of the said sums, or any part thereof. And it was found, that William Perryman did not enter into the said Tenements; And that afterwards the said John Curle, before any of the days of payment, let that Land to William Dibley by two several Demises for six years, rendyng the rent unto him, and died: that the Lessee entred by vertue of the said Demises, and took the profits, claiming nothing but the said term: That the said William Dibley the Lessee paid the rent annually to the said John Curle, and at the end of the term surrendered the said Tenements to the said John Curle. And they find, Quod postea & ante tempus quo, &c. viz. 11. December, 16 Jac. the said William Perryman made his Will, and devised those tenements to Richard Perryman the Lessor, by his Will in writing: And that afterwards the said William Perryman died; And that John Atwell was his Cousin and Heir; And that after his death Richard Perryman entred, and made the lease to the Plaintiff prout in the Declaration; And that the Defendant by the command of the said John Curle entred and ejected him. Et si &c. Upon this special Verdict, it being divers times argued at the Bar two Questions were principally moved. First, What interest John Curle the bargainer had by this agreement with the bargainee, that he should not intermeddle with the possessions until default of payment, viz. Whether he were Lessee for so many years, or only in, as Tenant at will, or sufferance: For it is not a covenant or agreement with the Bargainee, that he should enjoy it during those years,

for

(9)

1 Rol. 819.

Jones 316

Abc. 172.

1 Rol. 859.

Post. 684.

1 Cr. 304.

& 306.

* 1 Cr. 304.

1 Ventr. 277.

1 Cr. 304.

For then it would have amounted to a Lease for years: But that the Bargainee would not meddle with it, and to leave him in possession as he was, &c. which cannot be a Lease for years. V. 5 H. 7. 1. 21 H. 7. 36. Secondly, Admitting that he was not Lessee for years, but only tenant at the will of the Bargainee, or tenant at sufferance; whether his making a Lease for years, and the Lessee entering and paying the Rent, and claiming nothing but the term, and after in the end of the term yielding up the possession to the Bargainee, shall be a Disseisin: And if it be a Disseisin, whether it be not purged by the Re-entry of the Bargainee, and occupying it in statu pro prius, and reducing the Inheritance to the Bargainee, so as he was not out of possession, and so his Will thereof be good; For otherwise the Will is void? And as to this point all the Justices resolved, that when the bargainee entered (as it shall be conceived by the words Yielding up the Tenements at the end of the Term) If he were a Disseisor before (as they did not agree that he was, because neither the Lessor nor Lessee intended to make any Disseisin, the Lessee claiming but his term) it was only a Disseisin in the * Lessee for years: And when the term being expired, the Bargainee re-entered, that purgeth the Disseisin, and the bargainee is in, as he was before, and the Inheritance is reverted in the Bargainee, and his Will shall be good. And therefore they held, If tenant for Will be ousted by a stranger, and he re-enters, he is tenant at Will to his Lessor. For otherwise it would be a mischievous case in many assurances, where the Mortgager being in, upon condition to pay at the end of the year, and in the interim that the Mortgagee shall not meddle, who makes a Lease for half a year, and after re-enters before the day of payment; That he should be a Disseisor against his own intent, and the intent of the bargainee; that the bargainee should be said to be out of possession, so as he cannot make a bargain and sale, at his will. By this means many assurances would be destroyed, which the Law will not suffer. Wherefore the Law accounts, that the Bargainee by his Entry is in, of his former Estate, and the Will of the Bargainee is good: And by all the four Justices it was adjudged for the Plaintiff. Vide Co. lib. 2. fol. 54, 55. 34 H. 8. 15. 13 E. 4. 4. 18 H. 7. 48.

Elizabeth Archer Executrix of John Archer *versus* Dalby.

(10)

ERror of a Judgment in the Common Bench, and upon the Attawny in the said Judgment. The first Error assigned in the Attawny was, for that the Exigent (wherein is recited a former Exigent quod allocat. quatuor Comit. exigi faceret the Defendant, which bare Teste Craffino Ascensionis, and it) was returned, Quod ad Hustings de placitis terræ holden the same day it bore Teste, He was quinto exactus, & non comperuit. And for this cause, Error was assigned. Secondly, for that the former Hustings were de communibus placitis, and this is de placitis terræ and so varies, and therefore ill. Thirdly, because it is upon the same day it bare Teste, which ought not to be. And for this last cause it was holden to be ill, and reversed: But for the first causes they much doubted; For there be presidents that the Hustings

Hustings are held alternatim every fortnight, &c. V. 29 E. 3. 3. 21 E. 3. 35. 17 E. 3. 43. N. B. of E. 348. Tr. 11 Jac. rot. 2760. Mic. 7 Jac. rot. 3255. And the Error assigned in the matter was, For that the Pl. declares in debt for 60 l. upon a Deed, wherein he recites, that whereas Will. Corbyn had given divers of his goods to Joh. Archer the Testator: He covenanted, that if the said Corbyn should pay a debt of 63 l. (for which the said J. Archer stood bound in 120 l. to pay to one John Shipton upon the 2. of June then next following) and should save harmless the said J. Archer from the same; that then the Pl. should have and enjoy concessionem of the said J. Archer of the moiety of the said goods; Ad quas conventiones performandas he obliged himself by the said Writing to the Pl. in 60 l. And alledgeth in fact, that the said W. Corbyn upon 2. Jun. secund. formam & effect. scripti præd. paid 63 l. By which payment of the said 63 l. the said W. Corbyn hath saved him harmless from the said 63 l. So that he was not damaged; and that neither the said J. Archer in his life time, nor the said Eliz. since, had made any grant unto him of the moiety of the said goods granted him by the said John, per quod Actio accrevit, &c. The Def. pleaded, that the said W. Corbyn had not paid the said 63 l. &c. whereupon they were at issue, & Verdict and Judgm. for the Pl. And now assigned for Error, that here was not a good breach. First, because he doth not shew what the goods were whereof the Deed of gift was made. Sed non alloc. because the generality is sufficient. Secondly, the allegation is, that he had saved him harmless from the 63 l. whereas it ought to have bin from the 120 l. Thirdly, because he doth not shew, that he requested a grant of the moiety of the goods, & tendered a writing unto him to seal; For he being the party who is to have the benefit thereof, ought to make the tender. And for these causes, but principally for the second, the Judgment was reversed. Ante 171.

Berry and his wife v. Nevys, Exchequer-Chamber, Tr. 18 Jac. rot. 770. (11)
Error of a Judgment in the R. Bench, in Action sur Trover & Jones 16.
 convers. of goods, & inter alia of 60 l. in money against B. & Fem. 1 Rol. 348.
 supposing that they converted them to their proper use. The Def. Jones 443
 pleaded Not guilty, & found against them for the 60 l. & Judgment
 given for the Pl. and that they should be in misericordia. The Error
 assigned was, because an action lies not against Baron and Feme for
 converting goods to their uses. For it is the conversion of the Baron
 only, & they are only to his use: And although they may be charged
 with a joint-battery or imprisonment, yet it cannot be so for goods
 converted. And of that opinion were all the Justices of the Com.
 Bench & Barons. And it was shewn, that this Judgment passed sub
 silentio after Verdict without exception. For, Pas. 19 Jac. betwixt
 Harrison & Bradford and his wife, in Action sur Trover of goods, and
 converting them to their use; after Verdict for the Pl. it was mo-
 ved, that the Action lay not, and there, it was adjudged for the Def.
 Hill. 19 Jac. rot. 921. V. 13 R. 2. br. 644. 39 E. 3. 22. And it was moved
 by Sherfield that the Judgment should be reversed quoad the Feme.
 Sed non alloc. Wherefore it was reversed. D q q q Rut-

1 Cr. 254-495.
 Ante 5.
 Yelv. 166.

*L. Mallett v.
 Sirfoot P. H. G. 2.*

Rutter *versus* Mills, Trin. 20 Jac. Rot. 1041.

- (12) **E**Rror in the Exchequer-Chamber of a Judgment in the Kings Bench in an Ejectione firmæ of a lease of Henry Pawney, 22. May 20 Jac. of an house in Windsor, Habendum à primo die Maij for three years; virtute ejus the Lessee entred and was possessed, Quousque postea scilicet eisdem die & anno the Defendant ejected him. After Verdict upon Not guilty, and found for the Plaintiff, and Judgment for him, the Error assigned was, that eisdem die, &c. refers to the first day of May, which is ultimum antecedens; And then the Ejection is alledged before the Lease made; so the Declaration is not good. Sed non allocatur; For the allegation of the first day of May is but for the beginning of the term; And the Declaration being, Quod virtute dimissionis he entred, Postea eisd. die & anno &c. That refers to the day of the Lease made, otherwise he cannot be possessed virtute dimissionis. Wherefore the Judgment was affirmed.

Ante 96.

Elston *versus* Durrant.

- (13) **E**Rror in the Exchequer-Chamber of a Judgment given in the Kings Bench. The Error assigned was, that in trespass of Claus. fregit averiis depascendo, viz. Equis, bobus, vaccis, porcis & bident. the Defendant pleaded Quoad any trespass cum aliquibus averiis præterquam cum duobus spadonibus & tribus vaccis, Not guilty; Quoad the trespass Clausum fregit & depascend. cum duobus spadonibus & tribus vaccis, he justifies for prescription of Common. And they were thereupon at Issue; And Verdict found for the first Issue; that the Defendant is guilty cum aliquibus averiis prout the Plaintiff counts, and assesses Damages and Costs; And for the second Issue, they found for the Plaintiff. And upon this Verdict, Judgment was given for the Plaintiff. And the Error assigned was, that the Verdict finding that he is guilty cum aliquibus averiis, not shewing what, is incertain and void: But if it had been found for the Defendant, it had been certain enough: Wherefore the Judgment was erroneous. Sed non allocatur: For, being found, that he is guilty cum aliquibus averiis præterquam, It is as general as the Count, and is not material for what number, or for what kind of Cattel; But the Verdict good enough, assessing damages for that trespass, and damages for the other trespasses severally. Wherefore Judgment was affirmed.

Ante 653.

Fawcett *versus* Charter.

- (14) **E**Rror in the Exchequer-Chamber, of a Judgment in the Kings Bench in Assumpsit against Executors, of a promise of their Testator, viz. That he should re-deliver such a Bond, delivered for such a thing; And because the Testator did not deliver the said Bond, the Action was brought against the Executor. And after Verdict

Jones 16.

Verdict and Judgment for the Plaintiff, Error was now assigned, that this being a *max* collateral promise made by the Testator, and broken by him, there lies not any action against the Executor. And of that opinion was Tanfield Chief Baron, who said, he knew it had been oftentimes so adjudged. And the difference is, between a promise to do a collateral act, and where it is a promise to pay a sum of money, which is a duty certain by the Testator; for the not doing whereof an action lieth against the Executor: But a collateral promise is not any duty, nor performable by the Executor; and therefore an action lies not against the Executor for the non-performance thereof. But the Lord Hobart and all the other Justices of the Common Bench, and Barons of the Exchequer held, that there is not any difference betwixt the cases, but in either of them the action is maintainable against the Executors, upon a promise of their Testator. And so it hath been oftentimes adjudged in this Kings time. But they said, true it is, that such an opinion was conceived in the time of Queen Elizabeth, and divers Judgments reversed for this cause: But now of late the opinions of both Courts are reconciled, and resolved, that the Action lies against the Executor as well in the one case, as in the other. Wherefore the Judgment was affirmed, against the opinion of Tanfield. And here on the first day, when the Debate was, Jones was absent: And it was much argued whether this Judgment should be affirmed or reversed, because the opinion of five of them was against it, and Tanfield and Winch for it, who said, that by the precise words of the Statute, there ought to be six agreeing to affirm, or reverse a Judgment. But this question they resolved not: For Jones came and agreed with the five. Whereupon the Judgment was affirmed.

Ante 405.
Ante 418.

Poph. 20.
Jones 16.
2d. 216

St. 27 El. cap. 8.

Webb *versus* Ingram.

ERror in the Exchequer Chamber of a Judgment given in the Kings Bench in Debt upon an Obligation of 100 l. for the performance of the Arbitrement of Dod Langton concerning all Suits and Controversies betwixt them about the Tythes of Corn and Hay in Upnorth, so as it were made in writing before such a day. The Defendant pleads, *Quod nullum fecit arbitrium*, &c. The Plaintiff shews, that he made an Arbitrement in this manner, viz. He arbitrated, that the said Webb the Defendant should pay to Ingram 40 l. before such a day; And in consideration thereof, the said Ingram should permit all suits & controversies depending betwixt the said parties to surcease, and not further to be prosecuted; And avers, that there were not any other Suits depending betwixt the said parties for the Tythes of Upnorth. The Defendant responds, that there were Suits depending then between them, concerning a parcel of Land in Upnorth, called Howfield, whereof there was not any controversy concerning the Tythe, &c. And hereupon it was demurred, & adjudged for the Plaintiff; and Error assigned in point of Law, that this award is now confessed by this Demurrer to be

(15)

Co. 10. 132. a.
Ante 353.

Ante 353.

Ante 448.

made of more then was submitted. And being entire in this point, all which is awarded on Ingrams part (being one entire clause) is void; and then nothing is awarded on the other part, and therefore void. And compared to the case betwixt More & Bedle, where a submission was for all actions until such a day, & they awarded a Release to be made until such a day after the submission, It was adjudged to be a void award. But all the Just. & Bar. held, that it was a good Arbitrement; for it is sufficient to cause him to surcease all suits concerning the Cythes: And it is therein good, & void for the residue; And not like to the case of the Release, for that is in one entire Dæd. And although the Pl. avers, that there were not more controverfies depending besides those for the Cythes; It was more then needed, & not material: And when the award comprehends that which is submitted, & more, It is good for that which is submitted, & void for the residue. Wherefore the Judgment was affirmed. V. Co. lib. 8. f. 98. 19 H. 6. 8.

Thomlins *versus* Hoe and his wife.

Ante 655.

⁽¹⁶⁾ **E**rror of a Judgment in the K. Bench in trespass for the Battery and False imprisonment of his *Feme*. Upon Not guilty pleaded, Verdict and Judgment for the Pl. the Error assigned was, that the Declaration was, Et alia enormia eis intulit; where the Battery & Imprisonment were only to the *Feme*, and the *Feme* may not joyn with the *Baron* for tort to the *Baron*; And therefore it ought to have been ei intulit, which is to the *Feme*, & for that cause the Declaration is ill: As also, for that the damages are given to *Baron* and *Feme* for a tort done to the *Baron*. Sed non alloc. For it is but matter of form and in aggravation of damages, & is not material, nor alters the substance of the Declaration: And the *Baron* may have wrong by the battery of his *Feme*; and therefore it might very well be, Alia enormia eis intulit. A second Error assigned was, because the Declaration is, that he assaulted and imprisoned the *Feme* such a day and year, and detained her in prison for twenty four days, But doth not say when; so it is uncertain when those twenty four days were. Sed non allocatur; For it shall be intended to be immediately after the Imprisonment. Wherefore the Judgment was affirmed.

Hendy *versus* Thirst, Hill. 19 Jac. Rot. 142.

3 Cr. 419.

⁽¹⁷⁾ **E**rror of a Judgment in the Common Bench. The Error assigned, for that the Original Writ was de Trespass in Ruddelow, & the Declaration was de Trespass in Boxe; and the Writ being certified, and the Court informed that this was the Writ whereupon the Declaration was founded; and upon Scir. fac. two Nihilis being returned: although Lea Chief Justice said, he knew Ruddelow to be an Hamlet within the Parish of Boxe; yet the Court not knowing it, It was held to be a variance in substance, not aided by any Statute. Wherefore the Judgment was reversed.

Bancroft *versus* Coe, Hill. 19 Jac. Rot. 963.

⁽¹⁸⁾

Action sur Trover & conversion of divers goods, & inter alia de uno Risco, Anglice a Trunk full of fine Linnen, ad valentia 20 l. & de una Pixide, Anglice a Box full of bands, cuffs & shirts, ad valentiam

valentiam 10 l. & of divers parcels of other goods. The Def. pleaded Not guilty, & Verdict found against him, & entire damages assessed to 80 l. And it was moved in arrest of Judgm. that this declaration is not good: for Riscus is but a Trunk only, & Anglice full of fine linnen to the value of 20 l. is uncertain; & damages were given upon that uncertainty. And it was said, that this case differs from Osbourn and Middletons case, Co. l. 10. f. 130. For there Fulcrum tecti may be construed & understood of all which appertains to the furniture of a bed; but Riscus with an Anglice full of linnen, cannot be intended to be understood & referred to linnen: And if it should be referred, it is uncertain; & if it should not be referred to linnen, it was never intended that 20 l. should be for the value of the Trunk: And therefore it is not good, as Pleyters case, Co. 5. f. 34. tresp. quare pisces suos cepit, is not good for the uncertainty. And of that opinion was Houghton: For if he had said de Risco, Anglice a Trunk full of gold to the value of 5000 l. and damages had been given accordingly; None will say that it was for the Trunk only, but for the gold therein; which had not been good for the uncertainty. But Lea, Doderidg & Chamb. held it to be good, and that damages should be intended to be given for the Trunk only. Wherefore it was adjudged for the Pl. Note, a Writ of Error was brought of this Judgm. and the Judgm. affirmed.

Holbach *versus* Warner.

Action upon the Case, whereas the Pl. 30. Martij, 18 Jac. was possessed of a Close called Hayes in Wolston, and the Def. was possessed of a Close called Green meadowhook in Wolston. Et quod omnes possessores of the said Close of the Def. from time whereof, &c. had used to make the Hedges & Fences betwixt his Close & the River of Avon, which runs between the said Closes, so as the Cattel in the Pl. Close should not come into the Def. Close; And that the Def. did not repair the Hedges, &c. whereby his Cattel for default of inclosure went out of his own Close into that Close, and from thence into the Close of one Wilcocks, who sued & recovered against him in Trespass: wherefore, &c. After Not guilty pleaded, and Verdict found for the Pl. It was moved in arrest of Judgm. that this prescription Quod omnes possessores, &c. is not good: For that may be for years, or at will; and none may charge for matter of profit, but he ought to prescribe in a tenant of a Freehold, or in him who hath the Inheritance. V. 12 H. 4. 8. prescr. 26. 29 E. 3. 32. 27 E. 3. 20. Co. 6. 59. Co. 4. 31. Dy. 71. And it was objected against this by Davenport, that it is hard for the Plaintiff to know the Def. estate; and it is allowed in the said book of 29 E. 3. and in the Book of Entries f. 140. Quod omnes terrarum tenentes used to inclose, &c. But it was thereto answered, that Terrarum tenentes implies Fee-simple; and this appears, because it is alledged repar' debet & solet, &c. And of that opinion were Doderidg & Hough. that for this cause the Declaration was not good; & allowed of the difference betwixt Terr. tenent. & possess. & said, there was an apparent difference. But Lea held it was good enough, because it was in an Action upon the Case, for wrong done by the possessor. Chamberl. was absent, Ideo adjourn.

(19)

Ante 152.

1 Vol. 265.

Ter-

Termino Paschæ, Anno vicefimo primo JACOBI
Regis in Banco Regis.

Stare versus Regem.

- (1) **T**Raverse of an Office in the Chancery: Two severall Issues being taken, the Ven. fac. was, *Ad triandum sepeales exitus nostros inter partes junctas*. It was not moved by Sir Henry Yelverton, that this Ven. fac. was ill, because it doth not specify what are the severall Issues, as it ought, and so is the course: And he cited, that Pasch. 20 Jac. in Youngs Case, for this cause a Ven. fac. was ruled to be misawarded. It was also moved, that the Issue here should be amended, because in the Traverse by the party tendered to the Office it is shewn, that Philip Stare Grandfather to the Plaintiff was seised in Fee, & obiit seiscitus de tenement. &c. The Kings Attorneys traverseth absque hoc quod obiit de tenementis prædictis modo & forma prædict. &c. The Traverser ut prius dicit, *Quod obiit seiscitus*. So the omission of the word seiscitus is in the traverse for the King. But it was confessed on both parts, that the Record in the Chancery was so: Wherefore it was much doubted whether it might be amended here without amending it first in Chancery. Wherefore they would advise of both points.

Ridges versus Milles.

- (2) **A**ction for words; Thou hast ravished such a woman, and I will make thee stand in a white sheet. Henden moved, that these words be not actionable; For, the last words expound the former. Et adjournatur.

Gilby versus Williams, Parson of Neath and Llannoit in Glamorgan-shire.

- (3) **P**rohibition. For that the Defendant being Vicar there, where were two Churches, sued in the Spiritual Court, surmising in his Libel, that whereas for 10 years, 20 years, 40 years, and 60 years, he ought to say Service in the one Church on one Sunday, and in the other Church the other Sunday alternis vicibus; It was agreed, he should say Service every Sunday, and have 4 l. viz. 40 s. of each Vill. to be taxed of the Inhabitants; and that the Plaintiff being taxed 4 d. had not paid, &c. And because he doth not alledge a Prescription, time whereof, &c. a Prohibition was prayed. But upon motion, because it is but a Pension, and merely spiritual, and triable there, and it is not necessary to alledge a Prescription but for sixty years; It was well enough, and shall be intended time whereof, &c. unless the contrary be shewn. And for that the Suit was before the Prohibition, and affirmed in the Appeal, a Consultation was granted, without enforcing him to appear and plead to the Prohibition.

Termino

Termino Trinitatis,

Anno vicesimo primo J A C O B I Regis
in Banco Regis.

Arthur Steer *versus* John Scoble and John Pinsent,
Pasch. 20 Jac. Rot. 252.

Action upon the Case. Whereas John Scoble 15 Jac. brought (1)
an Action sur Trover against John Charter in this Court, in
which action the Plaintiff and one William White were bail
for him; And it proceeded to Judgment, which was given for the
Plaintiff, and 140 l. damages; And the said John Charter upon the
said Judgment 17. April, 17 Jac. according to the custom of the
Court, rendered himself into the Marshals custody in discharge of his
Bail, as by the Record of the Recognisance appears, whereby the
said Arthur Steer and William White his Bail were discharged of
the Recognisance according to the custom of the said Court. That
the Defendants premissores non ignari, maliciose & deceptive in-
tending to charge the Bail with the Execution of 140 l. and well
knowing that the said John Charter had rendered himself to the Mar-
shal in Execution in discharge of his Bail, and that the Recogni-
sance was discharged, Mich. 18 Jac. at London procured a Capias ad
Satisfaciend. against the said Arthur Steer and William White upon
this Recognisance to the Sheriff of London, and to be taken in
Execution by the Sheriff of London; and to be detained until they
paid the 140 l. &c. Wherefore, &c. The Defendants pleaded Not
guilty, and Verdict for the Plaintiff, and 140 l. Damages assessed;
And afterwards moved in arrest of Judgment, that this Action lies Co. 7. 1. a.
not, because it is the act of the Court to award this Process. But 3 Cr. 629.
it was adjudged for the Plaintiff. And afterward Error being
brought, the Judgment was affirmed.

Wheatly *versus* Low.

Action upon the Case. Whereas he was obliged to J.S. in 40 l. (2)
for the payment of 20 l. and the Bond being forfeited; He deli-
vered 10 l. to the Defendant, to the intent he should pay it to J.S.
in part of payment sine ulla mora: That in consideration inde the
Defendant assumed, &c. And assigns for breach, that he had not paid;
whereupon the other had sued him for this debt, &c. The Defendant
pleaded Non assumpsit, and Verdict for the Plaintiff: And it was
moved in arrest of Judgment, that this is not any Consideration;
because it is not alledged, that he delivered it unto the Defendant
upon his request; And the acceptance of it to deliver unto another
sine mora, cannot be any benefit to the Def. to charge him with this
promise.

Ante 337.

3 Cr. 884.

promise, Sed non allocatur; For, being that he accepted this money to deliver, and promised to deliver it, It is a good Consideration to charge him. Wherefore it was adjudged for the Plaintiff. And Error being brought, and this matter only assigned for Error, the Judgment was affirmed.

Memorandum, Quod 29 die Junij apud Greenwich, recepi ex traditione Jo. Williams Episc. Lincoln & Custodis Mag. Signilli Angliæ in præsentia Dom. Regis, Billam signatam cum manu Dom. Regis effendi unus Servientium Domini Regis: Et eodem tempore ibidem suscepi Ordinem Militarem ex gratia Regis.

Memorandum, Quod die Jovis, tertio die Julij, Anno 22 Reg. Jac. & crastino post finem Term. Trinitatis, recepi Breve Dom. Regis ad suscipiendum statum & gradum Servientis ad Legem. Quod quidem Breve sequitur in hæc verba:

Jacobus Dei gratia, Angliæ, Scotiæ, Franciæ & Hiberniæ Rex, Fidei Defensor, &c. Dilecto & fideli nostro, Georgio Croke de Interiori Templo London Armigero, Salutem. Quia de advisamento Concilii nostri ordinavimus vos ad statum & gradum Servientis ad Legem, in Quindena S. Michaelis prox. futur. suscepturum; Vobis mandamus firmiter injungendo quod vos ad statum & gradum prædict. ad diem illum in forma prædict. suscipiend. ordinetis & preparetis: Et hoc sub poena mille librarum nullatenus omittatis. Teste meipso apud Westm. xxvj die Junij An. Regni nostri Angliæ, Franciæ & Hiberniæ vicesimo primo, & Scotiæ quinquagesimo sexto. Per ipsum Regem, &c. Edmonds.

Slack *versus* Bowfal, Hill. 20 Jac. Rot.

(5)

Assumpsit, Whereas the Defendant was indebted unto him in 5 l. pro reditu ante tunc debito, that the Defendant assumed to pay that 5 l. quandocunque requisitus; And alledgeth in fact, that after request at such a day, year and place made, he had not paid, &c. The Defendant pleaded payment, and found against him: And it was alledged in arrest of Judgment, that the Declaration was not good, because he doth not shew when the Rent was due, nor for what Term, nor upon what Contract. Yet because the Defendant had taken notice thereof, affirming that he had paid it, and Issue thereupon, and found against him; the Declaration is made good: But otherwise, Doderidge and Houghton held, that it had not been good. Wherefore it was adjudged for the Plaintiff. Note, there was not any Exception taken, that the Assumpsit is to pay a sum for Rent; which is a real and special duty, as strong as upon a Specialty: And in such case this Action lies not, without some other special cause of promise. But nothing was spoken thereto.

Ante 125.
Post. 682.
Ante 139.

Ante 598.
1 Cr. 415.

Honycomb *versus* Swete, Parson of Barrant in Cornwal.

(6)
2 Rol. 63.

A Prohibition was granted upon this surmise; That one Bond Lessee for years of such Lands, agreed with the Parson, that he should retain the land free from the payment of Tythes, in consideration

deration of 10 s. per ann. and of ten Loads of Wood; and alledgeth, that he always paid the said 10 s. and ten Loads of Wood, and the other had accepted it, and that he assigned this Lease to the Plaintiff in the Prohibition. It was now moved, that this Surmise, being parcel of the Agreement, and for Rent arrear discharged during the Parsons life, could not be good: wherefore it was prayed, that a Consultation should be granted. But the Court held, that the Surmise is good, being by way of Reteiner; and that the Assigné may take advantage thereof although it were by Parole. ^{Ante 137.} Wherefore they directed him to appear, and the other to declare; And that then the Defendant should plead to the Issue, or Demur, as he would.

Leonard Ford *versus* the King.

A Supplicavit issued out of the Chancery, directed to the Sheriff (7) and Justices of Peace of the County of Hartford, to bind the said Ford and two others to their good behaviour; And the Sheriff returned, that the two others non fuerunt inventi; And the Sheriff quoad Leonard returned ut sequitur: Memorandum, That such a day and year, coram nobis A. B. C. D. & E. F. Custod. Pacis Comitatus prædict. the said Leonard, &c. venit & recognovit, reciting the Recognisance verbatim, which was under the hands and seals of the said Justices of Peace, conditioned for the keeping of the Good-behaviour, &c. And that he had broken the Good-behaviour, entering with force into such Land. And hereupon the said Leonard in Chancery pleaded to issue: The Record being sent into the Kings Bench by the hands of the Lord Chancellor; whereupon a Writ of Nisi prius issued, and the Issue was tried and found against the Defendant. And now moved in arrest of Judgment, that this Recognisance was not well certified into Chancery, and the proceedings thereupon erroneous: for, being returned by the Sheriff, that such a Recognisance was taken before the Justices of Peace, It is an idle and vain Return; for they who take the Recognisance, ought to have certified it, as 21 H. 7. 20, & 21. is. And of that opinion was the whole Court, besides Lea Chief Justice, who held, that soasmuch as the Recognisance is returned into Chancery under the hands and seals of those who took it, and process is made thereupon, and the Defendant hath answered thereto, and Issue is joyned upon it, which is sent hither to be tried, It is not material. But all the other Justices denied it; in regard the Writ of Scire facias reciting all this matter, the Court here shall adjudge upon it according to the matters apparent unto them. Wherefore rule was given, that Judgment should be entered for the Defendant.

Young *versus* Englefield.

T Réspons de clauso fracto in parochia de Pancras, abutting upon (8) Grayes-Inn-Lane. The Defendant pleaded Not guilty; and the Record of the Nisi prius was Graves-Inn-Lane. Wherefore by reason ^{2 Rol. 721.}

of this mispission, because there was no such place, the Plaintiff was Non-suited. But now, in regard the Paper-book and the Roll were good, viz. Grayes-Inn-Lane, which was the true place; And it was but a mispission in the Record of Nisi prius, which was void, being variant from the Record here; a Venire fac. was prayed de novo to try this Issue: And presidents were shewn Trin. 9 Jac. Rot. 430. betwixt Farthing and Dapper, where in an Action upon the Case upon a promise, in consideration that he promised to pay 10 l. within six weeks, the Defendant assumed to do such a thing, and for Non-performance brought the Action; And upon Non assumpsit pleaded, the parties being at issue, the Record of Nisi prius was, In consideration that he promised to pay 10 l. within six months: And for this variance being against the truth, and the former Record, the Plaintiff was Non-suited, and upon advisement of two Presidents a Ven. fac. de novo was awarded; and the Issue being tried for the Plaintiff, Judgment was given for the Plaintiff. And this President being shewn in Court, and the Roll thereof well weighed, the Court now held, that it was a good President, and stood upon good reason: For the Record of Nisi prius ought to be warranted by the Roll, and varying from it, is void, and the Non-suit upon it is not material. Wherefore they awarded here a Venire facias de novo.

Jermyn's Case.

(9) Jermyn, Rector of the Parish of St. Katherines in Colemanstreet, and Hammond, as Clerk there, sued in the Spiritual Court to have the said Clerk established there, being placed there by the Parson according to the late Canon, That the Parson of the Church should have the placing of the Clerk; where the Parishioners disturbed him upon pretence of Custom to place of a Clerk there by the Election of their Vestry. And upon this surmise of a custom, the Churchwardens and Parishioners prayed a Prohibition; and after divers motions, a Prohibition was granted: For they held, that it was a good Custom, and that the Canon cannot take it away.

1 Cr. 589.

2 Rol. 227.

Ante 532.

Termino Michaelis, Anno vicesimo primo.
JACOB I Regis.

Memorandum, This Term were made Fifteen new Serjeants, (1)
viz. George Croke, Rice Gwyn, John Bridgman, and Sir Hen-
nage Finch of the Inner-Temple; Richard Amburst, Tho.
Crew, Humphrey Dampart, Jo. Bridgman, Tho. Headly, and Francis Craw-
ley of Grays-Inn; R. Diggs, and Jo. Darcy of Lincolns-Inn; John
Hoskins, Egmond Thyn, and John Brampton of the Middle-Temple.
And although Tho. Headly was Antient to divers of them, yet because
he never had been a Reader, but refused to read, He was Puish to
them all besides Francis Crawley who read in Grays-Inn, after they
both had received their Writs to be Serjeants: which was done by
the advice of the Lord Chancellor and of the Justices. And Anthony
Heronden of Lincolns-Inn had also a Writ to be a Serjeant; but a
Writ of *Superfedeas* was delivered him the same day he received the
first Writ, and made returnable in Chancery: And when all the
others appeared in Chancery and took their Oaths of being Ser-
jeants, he was denied to joyn with them.

Page *versus* —

Note upon Evidence to a Jury, for the custom of the Manor of
Turlox in the County of Bedford, in the Common Bench. (2)
The custom upon Evidence in an Ejectione firmæ was found to be, that
the Land was demisable for 21 years, paying the treble value of the
rent: And if he died within the term, that the term should be to his
heir, paying a Fine certain of one years rent; And if he assigned the
term, the Assignée should have it paying for a Fine one years valu-
of the rent; And he who had it, might by the custom renew it for
21 years, paying three years value. And this was admitted to be
a good custom by the Court.

Bridgman *versus* Lightfoot.

Error of a Judgment in the Common Bench: For that Elizabeth
Bridgman was sued as Executrix to her husband, for breach of (3)
a Covenant made by the Testator, But the breach was by the Ex-
cutrix in assigning over a lease, without giving notice thereof to the
Lessor. The Judgment being for the Plaintiff, was de bonis Testa-
toris si, &c. Et si non, &c. de propriis bonis. And for this cause the
Error was assigned: For that it ought to have been de bonis Testa-
toris for the Damages; But for the costs, it ought to have been de
bonis propriis. But it was urged, that in regard this was a breach
by the Executrix in her time, & a wilful (and not a negligent) breach,
therefore the Judgment should be de bonis propriis. And of that opi-
nion was Lea Chief Justice at the first: But Chamberlain, Doderidg,

R r r 2

and

Hob. 188.

1 *Said* 112Moor 70.
Ante 648.

Ante 648.

and Houghton the contrary, Because it is a Charge only by the Act and Covenant of the Testator: And although she her self brake it, yet she is not chargeable but in regard of the Dêd of of the Testator, wherefore she shall not be charged but de bonis Testatoris. And that in no case an Executor shall be chargeable de bonis propriis, but where he pleads Ne unque Execut. and found against him; for he thereby estrangeth himself from the Testator, and by his own falsity and folly hath made his own goods chargeable, si non sit de bonis Testatoris. Also where he pleads a false release made unto himself; because it is a falsity in his own knowledge, and ought to pay a fine unto the King: Therefore he shall answer de bonis propriis, si non, &c. And in maintenance of this point, they relied upon 15 Eliz. Dy. 324. and on a Case adjudged 20 Jac. betwixt Winterbourn and Bull, for not repairing of an house in Canterbury in the Executors time, &c. And Lea Chief Justice changed his opinion and agreed with them. Wherefore the Judgment was reversed. And the Lord Hobart, Justice Jones, and Baron Denham being informed thereof, agreed with them in opinion, that the Judgment ought to be de bonis Testatoris; And that the Judgment in the Common Bench passed sub silentio, without any motion of that point unto them.

Philpot *versus* Feeler.

(4)

Action upon the Case for words, brought in the Chancery by the Pl. being a Clerk there. Upon Not guilty pleaded, a Ven. fac. was awarded, returnable in the K. Bench. The writ was, Venire facias 12. quorum quilibet habeat 4 l. terr. ad minus, &c. After Verdict for the Plaintiff, it was moved in arrest of Judgment, that this Ven. fac. was ill: For the Stat. of 27 El. c. 6. which appoints how Jurors shall be returned, where this clause (Quod quilibet eorum habet 4 l. terr. &c. is comprised) extends only to writs of Ven. fac. in the K. Bench, Com. Bench, Exchequer, and Justices of Assize, and to no other Courts; and the Chancery is omitted: And therefore the Ven. fac. is not warranted by the Statute. But it was thereto answered, that this clause inserted in the writ, although it be not warranted by the Statute (as it was agreed by all the Justices upon perusal of the Stat.) yet it is not prejudicial to any, but makes the better trials. And by the Common Law, Judges may direct a Ven. facias tales quorum quilibet habeat tantum de terris, in cases where the matter is of great consequence; But they may not appoint of lesser value then the Stat. limits. And divers presidents were shewn out of Chancery, where always the Ven. fac. is, Quod quilibet eorum habeat 4 l. terr. &c. And the Certificate of the Clerk of the Pety-Bag, that all their presidents are so since 27 Eliz. And Chamberlain Justice said, that so are the presidents in Chester, and Wales, when he was Justice there. And if it had been a question, whether it were good at the Common Law; yet it is clearly now made good by the Stat. of 32 H. 8. of Jeofails. Wherefore it was adjudged for the Plaintiff. V. Hill. 33 Eliz. rot. 92. betwixt Morrice and Thomas, the like Judgment.

3 Cr. 257.

Slack-

Slackman *versus* West.

Action upon the Case: Supposing, That the Governoꝝ and the Poor of the Hospital of the Holy Trinity in Greenwich of the foundation of Henry Earl of Northumberland, was seised in Fee of an house in the Parish of S. Martins in the field; And that he and all those whose estate in the said house, &c. have had a foot-way from the said house unto the River of Thames in the same Parish, & let the said house to the Plaintiff for years; That the Defendant erected a Gate cross the said way in the said Parish, &c. Upon Not guilty pleaded, and found for the Plaintiff, it was moved in arrest of Judgment, That this Declaration was not good; because it is shewn, That the Corporation and all those whose estate, &c. have had, &c. Whereas a Corporation cannot prescribe but in him and his Predecessors: Also one cannot shew a Que estate, without shewing how by Dæd; for they cannot have it without Dæd. And of that opinion was Doderidge Justice: But all the other three Justices against him; Because the action is brought by the Lessee for years, who hath not the Deed; and it is but a Conveyance to the action, which is grounded upon the disturbance done unto him in possession: But if he had claimed Rent or Common in gross, which cannot pass without Deed, it had been otherwise; For there he could not shew Que estate, without shewing the Dæd how he came by the estate. Wherefore it was adjudged for the Plaintiff.

(5)

Ante 86. 123. 2 *Knl.* 139.
Ante 70. 327,
328.
Hob. 218;
Ante 272.

Dalton *versus* Episcopum Eliens.

Quare Impedit. Where a Bishop suffers an Usurpation of a Church in right of his Bishoprick, That it shall not bind his Successor, but himself only during his time: And if a Bishop be Purchaser of an Advowson in right of his Bishoprick, and suffers an Usurpation, yet that shall not bind his Successor, as Hobart held. But as to the principal point he said, they were all resolved, That Usurpations shall bind the Bishops who suffer them, but shall not bind their Successors (and so of Descents:) For it is within the Statute of 1 Eliz. which restrains Alienations and Grants by Bishops, &c. Wherefore it was adjudged for the Defendant.

(6)

Jones 45.

Lit. Sect. 413.

Smith *versus* Ward, in Com. Banco.

Action upon the Case: For the Defendant said of the Plaintiff, He (innuendo the Plaintiff) is a Thief; for he hath stoln Corn from Mr. Key, quendam Richardum Key innuendo. The Def. saith, That he spake other words of the Plaintiff, and traverteth that he spake those words; and found against him, and damages 6l. And it was now moved in arrest of Judgment, That this action lies not: For he doth not shew, That there was any precedent communication of the Plaintiff; and the word He, without shewing some former discourse

(7)

discourse concerning the Plaintiff, cannot be applied unto him more then to any other; and to that purpose, Co. 4. f. 19. Bretriges Case was cited. Secondly, it was objected, that the words, He is a Thief, for he hath stoln Corn, &c. be not actionable; for it may be standing Cozn: As to say, He is a Thief, for he hath stoln my Trees, or my Evidence, or my Lead of my house, no action lies; (which last Cases the Court agreed to be good Law) For in those cases it is not shewn that any felony was committed, and the words do not import any felony. But here stealing corn is intended corn reaped: And for that purpose a president was cited Trin. 4 Jac. rot. 354. Child v. Sanders, for saying, Thou hast stoln my Wood, action lies. Wherefore for this point they all held that the action was maintainable. But because he doth now shew that there was any communication of the Plain. they doubted: But afterwards upon view of presidents, and being informed that it was a common course so to declare; when it is alledged, That he said de prefato the Plaintiff hæc verba, It is necessarily to be intended of the said Plaintiff: And when the Jury hath found, that he spake those words of the Plaintiff, that helps the case; For otherwise the Jury would not have found against the Defend. Wherefore it was adjudged for the Plaintiff. And a president shewn Hill. 18 Jac. rot. 1237. in the Kings Bench, Sanders *versus* Woolrich, Action for that he said these words of the Plaintiff; He (innuendo the Plaintiff) is a Traytor: The Defendant pleaded Not guilty, and found for the Plaintiff; And although no communication was alledged to have been before of the Plaintiff, yet the Plaintiff had Judgment, and that Judgment affirmed in a Writ of Error.

Ante 40.
3 Cr. 563.
Co. 4. 19. b.
Ante 136.

Ante 241.

Reynel *versus* Kelsey, in the Common Bench.

(8)

DEbt for 94 l. by Richard Reynel, as Executor of Sir Tho. Reynel; For that the Testator and Def. accompted together, and the Def. was found 94 l. in arrearages, which he had not paid. The writ was recited in the Declaration; And the Count suppoeth the accompt to be apud Exon; and the verdict upon Non debet found for the Plaintiff. And it was now moved in arrest of Judgment, that the Original Writ was in the County of Devon, supposing the accompt to be there, and all the matter there; So the writ lies not upon this declaration. And shewed a copy of that writ in the County of Devon, & upon examination it appeared, that there was not any in Exon. And it was therefore moved, That Judgment might be stayed: For although the Statute of 18 Eliz. helps after Verdict, when there is no Original; yet when there is an Original which varies from the Declaration, & doth not warrant it, it is not aided by the Statute. But all the Court held, after several motions, That the Plaintiff should have Judgment: For this is not any Original for this action in the County of Exon; and so it shall be taken, as if there had not been any Original, and to be within the purview of the Stat. And a president was cited in the Kings Bench, where in trespass of Battery, the Bill upon the File was in London, and supposed all the Fact

Fact to be at London, and the Declaration was in Middlesex: After Verdict upon this Declaration, it was moved in stay of Judgment, Ante 655. because the Bill which is in nature of an Original, varies from the Declaration, and doth not warrant it: But because it is as no Bill for this Declaration, and within the Equity of the Statute, it was adjudged for the Plaintiff. So here. And although a president was cited & shewn to be in the Kings Bench betwixt Pollard and Blight, Pasch. 16 Jac. quod vid. ant. f. 479. where a Writ of Error was brought upon a Judgment in the Common Bench, and the Error assigned after Verdict and Judgment for the Plaintiff, because the Writ varies from the Declaration; And upon Diminution alledged, the Writ certified that it was betwixt the same parties in Middlesex: And for this cause the Error was assigned; For that the writ is recited in the Count, and the Declaration is of a Battery in Lond. And the Writ certified upon that Record, and that the Writ betwixt the same parties was in Middlesex, and for this cause reversed: The Court said, the reason there was, because it is there certified to be the Writ whereupon the proceedings were, and that there was not any other Writ; But that shall not be intended in this Case, but the contrary. Wherefore it was adjudged for the Plaintiff.

Foster *versus* Inhabitant. Hundredor. d'Spechor. & Inleworth. Pasch. 21 Jac. Rot. 488.

Action upon the Statute of Hue and Cry; supposing, That he was robbed in such an High-way in Divis Hundredorum, and that he gave notice thereof to the Inhabitants of the Hundred, near to the place where he was robbed. After Verdict for the Plaintiff, it was moved in arrest of Judgment, that this Declaration is not good, because he doth not shew, that the High-way is within any Hundred; And in truth, it ought to be given to the Inhabitants of both Hundreds; and so be divers presidents, that notice was given in such a place within the one Hundred to the Inhabitants of the said Hundred, and in such a place in the other Hundred to the Inhabitants of that Hundred. Sed non allocatur; For, if notice be given to the Inhabitants of either of them, it sufficeth. Wherefore it was adjudged for the Plaintiff. (9)
27 El. cap. 13.
1 Cr. 42.

Sir William Tharold *versus* Spight, in the Com. Bench.

Replevin of the taking of his Cattel in quodam loco vocat. in S. in parochia de C. The Defendant justifies; for that the place where, is 100 Acres of Pasture in C. which is the Freehold of Sir Francis Popham to whom he was Bailiff, and that they were there *Damage fesant*. The Plaintiff in bar to this Adowry saith, That he was seised in fee of a Messuage and 100 Acres of C. aforesaid; and that he, and all those whose estate he hath in the said Messuage and 100 acres of land, have had time whereof, &c. Common of pasture for all their beasts levant & couchant upon the said Messuage and 100 acres of land in the place where, &c. at all times of the year, as belonging to the said tenements. The Defendant traverseth this pre- (10)

prescription; and Issue joyned upon the prescription, and a trial at the Bar for the Plaintiff. And it was now moved in arrest of Judgment, that it is a Mistrial, because it was tried by a Ven. fac. from C. only, and not from S. where the place of the taking is, as well as from C. where the land lies, whereto the Common is claimed. And although it were alledged, that the place where, is within the Parish of C. so the Venire being of C. only, is good enough; For it shall be intended, That C. the Parish, and C. the Village be both one: But it was said, That if the Ven. fac. had been of the Parish of C. or it had been alledged in the Bar, that the Land was in C. prædicta; then C. the Village, and C. the Parish had been intended to be both one; But not being so alledged, it may well be intended that they be several. Wherefore the Court held it to be a Mistrial, and a Venire fac. de novo was awarded.

Ante 263 341.

Sir Robert Philips *versus* Slade in the Com. Bench.

(11)
2 Rol. 614. 5.

DEbt upon the Statute of 2 E. 6. for not setting forth of tythes of Corn. The Plaintiff shews, that he is seised in fee of the Rectory of Yewel; and the Defendant was occupier of certain land in Preston within the said Parish, whereof the tythes were due unto him; and that he cut down and carried away the Corn, without setting out the tythes, to the value of 13 l. 6 s. 8 d. Wherefore he demands the treble value. The Defendant pleads, that Sir John White was seised in fee of the Mannor of Preston; within which Mannor is a Custom, That he and all those whose estate, &c. have used to pay 35 s. to the Owner of the Rectory of the Parish Church of Yewel, in lieu of all tythes growing within the Mannor; and that the said Sir John White let unto him the said Lands, &c. And Issue was upon this prescription, and found for the Plaintiff. And it was moved in arrest of Judgment, That this trial was ill; because the Venire ought to have been as well from Yewel as from Preston. And of that opinion was the whole Court, after several motions; For that the custom is to pay to the Church of Yewel; so the Venire ought to have been as well from the place of payment who properly have notice thereof, as from the place out of which the payment ought to have been. Whereupon a Ven. fac. de novo was awarded.

Ante 328.

Hilsden *versus* Mercer.

(12)

Action for words. Whereas the Defendant having communication with one Chapman of the Plaintiff, spake these words: She (innuendo the Plaintiff) is a Thief to you and to me, and hath stoln 20 l. from me, and 40 l. from you. The Defendant saith, that the Plaintiff was a Thief, and stole two Hens from her such a day and year feloniously; and thereupon she spake these words in the Declaration. Whereupon the Plaintiff demurred; because it is not any cause of Justification of all the words, nor of any part of the last words. But it was said, that in as much as it is a Justification, in that she was a Thief, which are the principal words, the other words are not material to be answered unto, Sed non allocatur; For the last words

words are as slanderous as the former ; and there was not any Justification of them, nor Answer unto them. Therefore the plea is vitious, and Judgment was given for the Plaintiff.

Harvey versus Hundred de Chelmsford.

Error of a Judgment in the Common Bench upon the Statute of Hue and Cry. The Error assigned and insisted upon was, (13)
that at the Nisi prius, Tales de circumstantibus was awarded, and two returned and sworn ; and afterwards by consent, one of the Jurors was withdrawn, and the Jury discharged: And afterwards in Banco, Habeas corpora was awarded against the first Jurors, and the Jurors returned upon the Tales ; Et quod appon. decem tales. Which Henden Serjeant assigned for Error ; because there ought not to have been any mention made of the Tales at the Assises ; For what was done there, is as Null here, when new proceedings, &c. For that is only by the authority given to the Justices of Nisi prius, but not to be regulated in Banco. Sed non alloc. For, it being granted, and the Jurors sworn, it is as parcel of the Record, whereof the Court ought to take consufance. Wherefore the Judgment was affirmed.

Buckley versus Guilbank in B. R. Trin. 20 Jac. Rot. 32.

Ejectione firmæ of a Messuage in Lond. Upon Not guilty pleaded, and issue thereupon, a special verdict was found, that Robert Guilbank was possessed of a Lease for years of the said Messuage ; (14)
And upon 23. May, 1617. it was agreed betwixt him and John Smith Lessor for the Plaintiff, that he should lend to the said R. Guilb. 120 l. for a year then next following, upon Security for the repayment of the said 120 l. & of 12 l. for the interest thereof, upon May 24. 1618. & that he lent the said 120 l. accordingly. And the said R. G. the said 23. May, 1617. was obliged with him in a Bond of 260 l. with a condition for the payment of the said 132 l. upon the 24. day of May next ensuing. And for the better assurance of the payment of the said 132 l. he then made this Lease by Indenture to the said J. Smith, with a condition, that if he paid the said 132 l. at the day and place mentioned in the Condition of the Obligation, that then the Assignment should be void. And they find, that the Scrivener who drew this Obligation & Assignment, by mistaking the said Agreement betwixt them, drew it in this manner ; & that the said J. S. sealed the Counterpart of the said Indenture of Assignment. They find the Stat. 37 H. 8. & 13 El. of Usury ; and that the said 132 l. was not yet paid ; whereupon John Smith 19 Jac. entred and made the Lease to the Plaintiff, who entred and the Defendant ousted him : Et si super totam materiam, &c. And here, upon argument two questions were moved. First, whether these words, The 24. of May next ensuing, shall be intended May the twelvemonth after ? For then there cannot be any question of the Usury: Or shall be intended the same month of May, which was the next day following ; And then the question was, If Usurious, or no ? And thereupon Doderidge and Houghton held, that [Next ensuing] 2 Rol. 241.
shall be intended of the same month of May, which was the next Antc 646. 71.

§ § §

Day

1 Cr. 501.

day after; unless the circumstances of their agreement had been found, That the agreement was to lend it for a year, and to make payment thereof at the years end; then these words doubtful to which they should be referred, may be intended & extended to be to May twelve-month following, & the doubts of the *Usury* taken away, as 23 Dy. 376. But generally, 24. May next following, shall be intended to be the 24. of May of the same month. But *Lea Chief Just.* held, that Next following shall not be referred to May next following, unless some matter in the same *Deed* might be shewn, & not a collateral agreement found by the Jury, nor any collateral *Deed*. But they all held, although it should be expounded to refer to May 24. the same month and year, which is the next day (as it was in *Prescot's case* (quod v. ant. f. 646. 7.) yet forasmuch as the agreement is found to be to make the Loan for a year, and that the Assurances were for the payment at the end of the year, & by the *Scribener's* mistake it is made payable the next day, it is not *Usury* within the Statute; For there was not any corrupt agreement betwixt them, but a true and an absolute agreement; And the act of a stranger shall not bring him within the danger of the Statute, especially it being found that he did not requite his payment until after the year. But *Lea Chief Justice* said, If he had sought by reason of this misprision to have taken advantage of the Forfeiture for non-payment upon the next day, peradventure it would have discovered a corrupt intention in him, and that he knew of that misprision at the beginning and would take advantage thereof; & this should bring him within the Stat. of *Usury*: but as it is found, it is clear, it is not any *Usury*, nor the Assurance to be avoided by the Stat. wherefore it was adjudged for the Plaintiff.

Johns versus Ridler.

(15)

Ejectione firmæ of a Messuage and Lands in L. in the County of Monmouth, of William ap Williams. The *Def.* pleaded, that long time before the said Lease and Ejectment, one *Wil. Ridler* was seised in fee, and let that land to the Defendant for five years, and that he was possessed until the Lessor of the Plain. entred upon the Defendant, & ipsum disseisavit; And so seised by Disseisin, made the Lease to the Plain. whereby he was possessed, and the Defendant re-entred and ejected him, as it lawful was for him to do. The Plaintiff replies, that the said W. ap Williams the Lessor was seised in fee, and let to the Plaintiff, and the Defendant ousted him; And traverseth, that he did not disseise the Defendant; And Issue joyned thereupon and found for the Plaintiff, that he did not disseise, &c. And it was moved by Tailor in arrest of Judgment, That this is a vain and idle Issue: For when the Defendant shews, that he is but Lessee for years, and was possessed as Lessee, he cannot then be disseised; And the allegation of the Disseisin is vain and impossible, and the Issue being taken upon it is vain and idle: wherefore it is a mis-trial, and no Judgment can be thereupon. But all the Court held, Although this plea of the *Defen.* be vitious, and the Pl. might well have demurred thereunto, yet he himself shall not take advantage thereof; And

And having confessed that the Plaintiff hath a good Lease, and that he ejected him, Judgment may be given against him upon his plea. But there being here an Issue joyned upon this false Allegation, Ante 86. and being found by the Jury, that the Lessor of the Plaintiff had not disseised him (which well stands with the Law) the Judgment shall be well given upon this Verdict against him: But if it had been found for the Defendant, that the Lessor of the Plaintiff disseised him (which is against Law that he should be disseised, being but a Termor) peradventure he should not have had Judgment. But as it is found, the Verdict well stands with the Law, that the Lessor did not disseise him, and he shall not take any advantage of his own vicious plea. Wherefore it was adjudged for the Plaintiff.

Sir Nicholas Sanderfon *versus* Harison.

DEbt for 67 l. rent, upon a Lease for years of Land in D. And for rent arrear for a year and a half at the Annunciation, 19 Jac. he brought the action. The Defendant pleads, and confesseth the Lease and Reservation: But further pleads, That the Lessor and all those whose estate, &c. have had Common in ten acres in Eastfield always for their beasts levant and couchant upon the said tenements, every year after the Corn sown, from Aug. 7. until the Corn reaped and carried away; and that before any rent was due, Sir N. Sanderfon the Lessor inclosed the said ten acres wherein he ought to have had his Common, with hedges and ditches, and ejected him, so as he might not use his Common; and thereby his rent was extinct. Whereupon it was demurred. First, because this Land inclosed is not alledged to be sown with Corn; otherwise by his prescription he is not to have Common. Secondly, because he did not shew, that he kept it inclosed with force; otherwise he may well break the hedges and take his Common. Thirdly, it was moved, That the allegation wherein it is expressed, That he inclosed the Common, whereby the rent is extinct, is a vain allegation; For the rent is not issuing out of the Common, and so there cannot be suspension by inclosing the Land, &c. And of that opinion was all the Court, and that the plea was ill upon the first Exception; And therefore adjudged it for the Plaintiff. (16)

William Stonehouse *versus* Sir Thomas Read and others, Trin. 7 Jac. Rot. 43.

DEbt upon the Statute 2 E. 6. for not setting forth of Tythes: And shews, That the Defendants in the year 1607. & 1608. were Occupiers of 128 acres of Meadow in Radley and Thorp; And that Robert Abbot of Abingdon was seised in Fee de Decimis prædictis crescent upon the said lands; and in an. 31 H. 8. surrendered them to R. H. 8. which descended unto R. E. 6. and from him to Du. Mary, & so unto D. El. who in an. 36. reg. sui by her Letters Patents (here shewn) demised Decimas præd. to the Plaintiff for life: And that the Defendant, 1607. cut down the Hay growing thereupon, to (17)

the value of twenty marks, and carried it away without paying the Tythes; and so in the year 1607. wherefore he demands the treble value, being 40 l. The Def. demands Oyer of the Letters Patents, which was entered in hæc verba: That the Queen demised unto him Omnes illas Decimas suas super quand. parcellam terræ vocat. Bremere in parochia de Radley, nuper in tenura Tho. Harison; Ac omnes illas Decimas crescent. super quand. parcel. terræ vocat. Barton-Bremere, nuper in tenura A. Read in parochia de Radley præd. Et sic de 13 federal parcels, Quæ nuper fuerunt parcelle possessionis Monast. de Abingdon: Exceptis omnibus illis Decimis in Radley in tenura Johannis Tyndal, ver. redditus 67 l. And upon this Declaration the Def. demurred in Law; because the Pl. in his Declaration hath not sufficiently entitled himself to the tythes of the 128 acres of the Meadow in the Declaration mentioned. For by the Patent shewn (which is now as part of the Declaration) it is not expressed, that the Qu. granted those tythes by any the names in the Letters Patents; Nor is it averred, that those lands were any of the lands mentioned in the Letters patents, nor that those lands were in the tenure of any of the persons mentioned therein; for, it is not a general grant of all the tythes in Radley, but of the tythes of such lands in the tenure of such persons: nor is it averred, that they were in the tenure of such persons; otherwise they did not pass. And in proof hereof the books of 7 E. 6. Dy. 83. Plow. 191. Co. 2. 33. 4. 35. were urged. Secondly, For that it is not shewn, that these be any of the tythes excepted; which ought to be shewn, when he pleads any Patent wherein is an Exception, as it is in Dy. 106. & 8 E. 4. 7. But notwithstanding these exceptions, the Court upon the first Argument adjudged the Declaration to be good: For the Pl. declaring, that the Queen granted prædictas Decimas, it is a sufficient allegation, That those tythes passed by that Patent: And if they had not passed, the Def. might have said, Non concessit; and if it were not in the tenure of those persons, or excepted therein, it might well have been shewn in Evidence. But when the Pl. saith, Quod concessit prædict. Decimas, without more, it is a sufficient averment in it self, that she granted them. And when the Def. demanded Oyer of the Patent, and then demurred, It is a confession of the Declaration, & that the Declaration well stands with the Patent, that she granted those tythes in question. And Doderidge held, that if she had granted those tythes by those names in the Patent, he needed not to have averred, that they were in the tenure of such an one named in the Patent, & were not excepted; for that had been more prolix then needed. But præd. Decimas implies as much; & it may be better intended by the Patent shewn, that they are tythes granted in the Patent: wherefore the declaration is good. And in proof thereof was cited 33 H. 8, Bro. Plea. 143. 1 H. 7. 28. Beauchamps Case. And thereupon without further argument it was adjudged for the Pl. although upon former motions in 8 Jac. when the demurrer was first argued, they were very strong against the Pl. But no Rule then being entered, now upon motion Judgm. was given against the Defendant.

Baker

Ante 35.

Hob. 4.

Baker *versus* Blackman, Pasch. 21 Jac. Rot. 424.

TRespass, Clausum fregit: The Defendant pleads, that long time before the Trespass, one James Stephens was seised in fee, and in 12 Eliz. infeoffed Tho. Norwood, to the use of James Baker, and Mary his wife, and the heirs of their bodies; and that they had issue Henry Baker, and died seised; which descended unto him, and from him to his three Daughters; and justifie by their Lease, and gives colour to the Plaintiff: The Plaintiff replies, that long time before the Trespass, Sir Tho. Tyrrel was seised in fee, and gave it to Edw. Baker, and Joan his wife, and the heirs males of their bodies; And that they had issue the said James Baker, and the Plaintiff, and that James had issue Henry, and died, which Henry died without Issue male; wherefore he as heir male entred, and that the Defendant committed the Trespass, &c. and traversed the seisin in fee alledged in James Stephens: Whereupon the Defendant demurred; and shews, that he traversed the seisin in fee of James Stephens, whereas he ought to have traversed the gift in Tail, which is the principal matter of the bar. And Henden Serjeant strongly urged, that for this cause the Replication was insufficient: But it was argued for the Plaintiff, that the Replication was good: And it is in his election to traverse the seisin in fee alledged in the Bar, or the gift in tail; And in proof thereof relied upon 4 Ed. 3. Traverse, Bro. 372. 26 H. 8. 4. Coke lib. 6. fol. 25. And of that opinion was the whole Court after perusal of these Books: Wherefore it was adjudged for the Plaintiff. (18)

Peters *versus* Heyward, Trin. 21 Jac. Rot. 262.

Error of a Judgment in the Common Bench, in *Detinue* of a Bond. Upon Non detinet pleaded, it was found for the Plaintiff, and the damages assessed to 7 l. and costs 6 d. and if the Bond cannot be restored, then they assessed for damages besides the 7 l. 20 l. more. And it was thereupon adjudged, that he should recover the said 7 l. and 6 d. for the costs, and the said Bond or 20 l. Et præceptum fuit Vicecomiti distringere for the said Bond or 20 l. And thereupon the Error was assigned; For the Judgment ought to be conditional, viz. the said Bond, or if he cannot have the said Bond, then the 20 l. and accordingly the Distringas ought to have been, to demand the Bond; and if it cannot be delivered, then the 20 l. but these words (and if it cannot be delivered) were omitted: Wherefore it was moved to be Error. And although Waller the Prothonotary of the Common Bench certified that there were divers precedents there in this manner; and it was said, that in the Book of Entries, Judgment is entred in this manner; and alledged, that the Judgment (19)

2 Rol. 101. 2.
1 Cr. 219.

Yelv. 71.
3 Cr. 116.

Judgment being, that he ſhall recover the Bond, or 20 l. tantamount, and is to be intended conditional, that he ſhall have the Bond ; And if he cannot have it, then the 20 l. yet upon conſideration of many other preſidents, and the Books which mention that the Judgment is and ought to be conditional in it ſelf, and not by intendment, The Court held, that the Judgment was erroneous ; For by that Judgment and awarding of Diſtringas, the Sheriff might diſtrain for the one, or the other at his choice, which ought not to be : But he ought to diſtrain for the thing it ſelf ; And if he cannot have it, then for the 20 l. And although the Writ of Diſtringas was well made, and in that manner as it was ſhewn to the Court ; yet forasmuch as the Judgment is otherwiſe, the awarding upon the Roll, which is the Warrant of the Writ, was not good : Wherefore Rule was given that the Judgment ſhould be reverſed.

Buckland verſus Otley.

- (20) **D**Ebt : Upon a Demife apud Creek, of an houſe and divers Lands apud Creek, and of ſuch ſeveral Cloſes ; And mentions not in what Till they were : The Defendant pleads Entry by the Plaintiff into parcel of the ſaid Lands in Creek ; So a ſuſpenſion of the rent : And iſſue thereupon, and found for the Plaintiff. And it was moved in arreſt of Judgment, that the Declaration was not good, becauſe there is no place mentioned where the other Lands were : And all the Court held, that the Declaration was not good for this cauſe ; And it had been good cauſe of Demurrer : But in regard the Defendant hath pleaded a collateral Plea, viz. Entry of the Plaintiff : That hath made the Declaration good ; For the Leaſe of the Land is admitted by this collateral Plea pleaded, as 18 Ed. 4. Wherefore it was adjudged for the Plaintiff.

Ante 668.

Termino

Ter.Hil. Ann.vicesimo primo J^ac.Reg.in B.Reg.Mapes Executor of Holdick *versus* Sir Isaac Sidney, in Co. B.

Assumpsit: For that the Defendant in consideration the Plaintiff would forbear to sue one J.S. upon an Obligation of 80 l. promised to pay unto him the said debt. And alledgeth in fact, in the writ, that he forbore to sue the said J.S. per magnum tempus: And that the Defendant had not as yet paid it unto him, licet requisitus. The Declaration was, that he forbore him per magnum tempus, viz. from such a time of the promise, until such a day, which was for a year and half after the promise, yet he had not paid it. The Defendant pleaded Non assumpsit, and found against him to the damage of 80 l. And Hitcham moved in arrest of Judgment, first, that this Assumpsit is not grounded upon any sufficient consideration, viz. that he should forbear for a certain time, so as it might appear unto the Court that there was a sufficient time of forbearance, and a sufficient consideration to maintain the action, as in Hil. 36 El. rot. 485. 1 Cr. 455.
1 Cr. 241.25. in Ban. Reg. Sackfords Case, it was adjudged, that an Assumpsit for the payment of a Debt, in consideration to stay a Suit per paululum tempus, was adjudged void: So in another case, that he should forbear per breve tempus; although he alledgeth forbearance for half a year, an action lies not; For the consideration is no sufficient ground for the action. Secondly, admitting that the consideration to forbear, &c. should be good, because it shall be intended to be a total and absolute forbearance, yet the Declaration is not good, because the Writ is, per magnum tempus he had forbore to sue, not mentioning any time. And the Declaration that he did forbear per magnum tempus, scilicet from the time of the promise until such a day, &c. and doth not shew that it was until the day of the Writ, &c. for if he doth not perform the consideration on his part, there is not any cause of action: And then here it shall be intended that he did not forbear until the day of the writ, because the day of the writ is not shewn. And it shall be intended strongest against the Plaintiff, that he did forbear but until such a day, and afterwards before the writ brought, sued that Action. And upon these Exceptions, it was argued at large: But now all the Justices, viz. the Lord Hobert, Winch, and Hutton (Jones being absent in Chancery) held, that the Plaintiff should recover; for they all conceived that a consideration to forbear to sue one such, for such a Debt is a good consideration; and it shall be intended a total and absolute forbearance, as Hutton and Winch held: And that if the Defendant paid it before upon this promise, and after the Plaintiff sued for the Debt, the Plaintiff is chargeable in an Action upon the Case; For it is an implied promise in the Plaintiff, that he should forbear his Suit totally: But yet when the Plaintiff hath forbore a convenient time (when there is no time mentioned) if the Defendant do not pay Ante 397.
Ante 250.
3 Cr. 337.
Hob. 88.
Ante 505.
Hob. 219. the

Hob. 216.

the Debt according to his promise, the Plaintiff may well sue him upon his promise, and he needs not tarry all his life. And here, when he shews that he forbore per magnum tempus, viz. such a day and year, that well agre's with the writ; and when the date of the writ doth not appear, it shall be intended that he did forbear until the day of the writ: And so the action is well brought. Hobert Chief Justice agre'd with them, that the action was well brought, and the Declaration good, because he shews he did forbear it for a convenient time. And he held, that he was not bound by this agre'ment to forbear totally. And denied that upon this agre'ment he is chargeable in an Assumpsit, if he (after this Debt recovered from the Defendant) should sue for the same Debt; For it is not a promise to restrain him totally; and without express words he is not chargeable by promise: Wherefore it was adjudged for the Plaintiff.

Brookbank *versus* Taylor in the Exchequer-Chamber.

(2)

Assumpsit: Whereas the Plaintiff, at the Defendants request, 20. Apr. 19 Jac. demised to one John Jennings his house in London for a year, à prædicto 20. Aprilis, 19 Jac. rending 50 s. quarterly. That the Defendant promised, if the said Jennings did not pay the rent, that he would pay it; And alledgeth in fact, quod virtute dimissionis, he entred the aforesaid 20. April, 19 Jac. and was possessed, and had not paid the rent: And that the Defendant licet requisitus, had not paid it. The Defendant pleaded Non assumpsit, and found against him; And the Jury find Damages occasione assumptionis prædict. to 5 l. And Judgment thereupon, and Error thereupon in the Exchequer-Chamber. The first Error assigned, because the Entry is alledged to be before the Term begun: So it is a disseisin, and then no rent is due: Sed non allocatur; For although he alledgeth an Entry, yet there is not any expulsion alledged, and so no disseisin: And the Debt is due by the contract, and the action lies upon it. A second Error assigned was, because it is not alledged, that notice was given that the other had not paid: Sed non allocatur; For he at his peril ought to take consuance of the non-payment, and pay the rent, otherwise the promise is broken. Thirdly, because the Verdict assesses damages, occasione assumptionis prædictæ, where it ought to be, occasione non performanceis promiss. prædict. For the promise is not the cause of the damages, but the non-payment thereof: Sed non allocatur; For the promise is the cause: And the Jury finding the Issue, and assessing Damages, although it were not found for what cause, yet it had ben well enough: Wherefore the Judgment was affirmed.

Co. Lit. 181. a.
Ante 660.Ante 288. 432.
493.

Memorand. In this Term Sir Robert Houghson one of the Justices of the Kings Bench died at his Chamber in Serjeants-Inn in Chancery-Lane, being a most reverend, prudent, learned, and temperate Judge, and inferiour to none of his time.

Termino

Termino Paschæ,

Anno vicesimo secundo J A C O B I Regis

in Banco Regis.

Holman *versus* Chute, Pasch. 22 Jac. Rot. 400. in C. B.

DEbt for 300 l. in the Debet & detinet; For that the Plaintiff by Indenture, by the name of Philip Holman, Executor of John Holman, demised unto the Defendant such Lands which he had by extent, for such a Debt, recovered by Joh. Holman; Habendum for so many years, rendring such rent, and for three years arrear brought the Action: Whereupon it was demurred, because the action is brought by him in the Debet & detinet, upon a Lease of land which he had as Executor: Sed non allocatur; For it is not brought by him as Executor, although he be named Executor in the Indenture; And this action is of his own contract: And although he made the Lease as Executor, yet making the Lease for years by Indenture, if he hath any other title, it passeth well enough, and is upon his own contract, and shall have Debt for it, as if he were seised in his own right. And Justice Jones remembered the Case of Sir George Reywel, quod vide ante fol. 546. where in Debt against him for the escape of a prisoner who was in Execution upon a Judgment in the time of the Testator, being in the Debet & detinet; Although the escape was in the time of the Executor, yet being for Debt due to the Testator, it ought to have been in the Detinet; For there is no act by the Executor, and the Debt is due to him merely as Executor: Therefore it was adjudged for the Plaintiff. (1)

Theakers Case.

ALphonfus Theaker Cousin and heir of William Theaker, after the death of William Theaker (because he had not any issue alive at the time of his death (but Mary his Feme was then supposed to be *enscint* by him) who died 15. Febr. 1623. and she was married again to one John Duncomb within a week after the death of her Husband) procured out of the Chancery a Writ (2)

¶ ¶ ¶

de

Co. Lit. 8. b.

- 3 Cr. 566. de ventre inspiciendo of the said Mary, directed to the Sheriff of London, to cause the said Mary to be searched, whether she were with child by the said William Theaker, & quando fuit paritura (no mention being made of her second marriage) and this Writ was according to the president 39 El. of the like Writ, against the Lady Willoughby; And this Writ was returnable in the Common Bench: The Sheriff returned, that he had caused her to be searched, and returned the Inquisition, that by such persons he caused her to be searched and found her to be *enseint*, Et quod fuit paritura within 20 weeks: Wherefore he now prayed a second Writ out of this Court to be directed to the Sheriff of Surrey, because she was removed with her Husband to Wanworth in Surrey, and there inhabited; That the Sheriff might take her into his custody, and keep her until she were delivered of her child, that there might not appear to be any false or supposititious birth; And that in the interim he should cause her to be viewed every day by certain Patrons named by the Court in the writ; and that some of them should be at the birth of the child, according to the said president of the Lady Willoughby: But because in that case the Lady was a widow, and so such a course might well be observed; but here, she is a *Feme Covert*, who ought to co-habit with her Husband; they would not take such a course with her, but left her with her husband, he entering into a Recognisance that she should not remove from the house wherein they then inhabited: And that one or two of the women returned by the Sheriff, should see her every day, and that two or three of them should be present at her travail; For it was said, that this issue might be well said to be the child of the first husband, and should inherit his land: So as if there were any false or supposititious birth, the Cousin and Heir might be dis-inherited: Wherefore a Writ was accordingly awarded to the Sheriff of Surrey, to cause her to be seen every day until her delivery by two at least of the said women returned by him; and that three of them or more should be present with her at her delivery, so as no falsehood might be in her birth. *Note*, After this course observed, she was delivered of a female child, who was afterwards by Inquisition found to be the daughter and heir of the said *William Theaker* deceased.
- 3 Cr. 566.
- Co. Lit. 8.b.

Termino Trinitatis, Anno vicesimo secundo
JACOB I Regis in Banco Regis.

Peter Harris *versus* Peter de Bervoir, Pasch. 22 Jac. Rot.
in Ban. Reg.

DEbt, supposing that one Squire delivered unto the Defendant 100 l. solvend. to the Plaintiff; and that he had not paid it to the Plaintiff: Wherefore he brought this action. After Verdict, upon Non debet, it was moved in arrest of Judgment, that Debt lies not; for there never was any contract betwixt the Plaintiff and Defendant, nor any delivery of the money by the Plaintiff to the Defendant, and therefore no action of Debt lies: Pet per-adventure he might have Accompt upon this Receipt; but no other action. But it was agreed, that the Bailor (if the money be not delivered unto him to whom it ought to be delivered) may have action of Debt, or of Accompt at his election; But he to whose use the Bailment was made, shall have but accompt only. And Dampont for the Plaintiff agreed, that if money be delivered to another to deliver to J. S. or to the use of J. S. There J. S. shall not have action of Debt, but accompt only. But when it is delivered (as it is here) solvend. to J. S. which is intended in satisfaction of a Debt: There it is not countermandable. And he who is to receive it as a Debt, may upon this Receipt have an action of Debt or Accompt. And to this purpose the Record of a Judgment was shewn, Trin. 13 Jac. in the Common Bench, Cornub. betwixt Greenville and Slaning in Debt, supposing that George Greenville delivered such a sum to be paid unto the Plaintiff. And for non-payment, Debt was brought, and adjudged for the Plaintiff. Vide 28 H. 8. Dy. 21. 41 Ed. 3. 10. 28 Ed. 3. Debt 146. That the Bailor may have Debt or Accompt; but not that *cestuy que use* shall have that action. But 36 H. 6. 10. & 39 H. 6. 44. are, that *cestuy que use*, the delivery is made, may have Debt or Accompt. And of that opinion were Doderidge and Lee: Wherefore rule was given that Judgment should be entred for the Plaintiff, unless other cause, &c. Vide 21 H. 7. 7.

Yelv. 24.
Hob. 206.

Foster *versus* Browning, in Common Bench.

Action for these words; Thou art as arrant a Thief as any is in England; For thou hast broken up J. S. chest, and taken away 40 l. After Verdict it was moved in arrest of Judgment, because he doth not aver that there was any Thief in England: And the last words do not import any Felony; For he sheweth not that he stole any money, or robbed him of any money: And therefore all the Justices held that the action lay not; For it is not to be maintained by Intendment, but by exprets words: For the first words without an Averment will not maintain an action. And the words do not prove any Felony to be committed; For the money may be ta-

(2)

3 Cr. 214. 306.

ken away, and the Chest broken open upon pretence of title, and in the mid-day, and presence of divers; and then it is not any felony: Therefore Hobert Chief Justice put the Case; If one saith, Thou art a Thief, for thou hast taken away my Corn; action lies not, for the taking may be lawful: But if he had said, For thou hast stolen my Corn, action lies; for it shall be intended Corn thrashed, and not in the sheafs: wherefore it was adjudged for the Defendant.

Goldingham *versus* Some.

(3)

Co. 9. 18. b.

1 Cr. 263.

Dower: The Tenant vouches the Heir in the same County, who enters into the Warrant, and pleads *Riens per descent*, and so they were at issue; and at the Nisi prius made default: whereupon at the day in Banco Judgment was given against the Tenant. And now Henden moved, that the Judgment ought to have been conditional, viz. against the heir for what he had in the same County, and if he had not any estate, against the Tenant. And so were several Books and Presidents, viz. Mich. 38 & 39 El. Rot. 1288. betwixt Ashburnham and where the Tenant vouched the Heir in the same County. Vide 3 H. 6. 17. 7 Ed. 6. Dowry 148. And the Court held that both ways were good.

Giles Bray *versus* Sir Paul Tracy.

(4)

Jones 51.

Co. Lit. 34. a.
Co. 5. 76. b.
Moor 18.
2 Inst. 301.

Waste; And declares upon a Lease for years, Remainder to Duke Bray for life, without impeachment of waste, remainder to Giles Bray in tail, for that the said Duke Bray is dead: And that the Tenant had committed waste in cutting down divers Oaks, to his disinherison. Upon Null waste pleaded, the Jury found all the Declaration; and that the Tenant had committed the waste in the life of the Tenant for life, who is now dead before the writ brought; Et si super, &c. And the Court held, that the Plaintiff should recover, and that there is not any variance betwixt the Declaration and the estate found; for he committing waste in the life of the tenant for life, when he dies, he in remainder may have the action, as if it had been done in his own time, and after the death of the Tenant for life; for although in the life of the Tenant for life, the Termor by his assent might have made waste, and he had not been punishable afterwards, yet when he is dead, he who committed the waste, hath done it to the disinherison of him in remainder; and it is all one as if it had been done after the death of the Tenant for life.

Crocker *versus* Kelsey, Hill. 25 Jac. Rot. 44.

(5)

Jones 60. 1.
1 Rol. 843.
1 Cr. 435.

Ejectione firmæ in the Kings Bench: Upon a special Verdict, the Case was, John M. and his Feme being tenants in tail, remainder to the heirs of the Baron, by a Conveyance made by the Baron during the Coverture: The Baron hath issue, a son and dies; the son in the life of his mother levies a fine to the use of himself & his heirs; the Feme lets the Land for 21 years, without reserving the

the ancient rent, and after dies, the son hath issue a daughter, and devises the Land to the Defendant, whether this were a good Lease to bind the Devisee of the son, after the death of the *Feme*, was the question: And adjudged for the Plaintiff that it was a good Lease. *Note*, this began in *Anno 22 Jac.* but adjudged in *Anno prim. Caroli* by all the Court after divers arguments at the Bar. *Note*, that afterward in 3 *Car.* a Writ of *Error* being brought upon this Judgment in the Exchequer-Chamber, and the *Error* assigned in the Judgment in matter of Law, and no other *Error*, it was argued by *Mason* for the Plaintiff, in the Writ of *Error*, and by *Dampart Serjeant* for the Defendant. And the principal reason insisted upon by the Plaintiff in the Writ of *Error*, was, because by the Fine with Proclamation by the son, the estate tail is docked and barred; And when the *Feme* died, the estate tail was not *in esse*, but determined: And therefore compared it to *Austens Case*, 3 *Mar. Dyer* and *Plowd. Walsinghams Case*, and *Coke 3. 51. a.* Sir *George Browns case*, and cited a case in the Common Bench, *Mich. 13 Jac. Rot. 763.* betwixt *Godfrey* and *Passon*, where a Tenant in tail had issue a son and a daughter, and the son levied a Fine with Proclamation, and died without issue, in the life of his Father: It was adjudged that it was not any bar to the daughter, who claimed the estate tail after the death of her Father, because she needed not make any descent or conveyance by her brother who is dead, without issue in the life of her Father. And she claiming immediately from the Father, this Fine could not bar or determine her estate. But here, he who levies this Fine, doth not survive the mother; and therefore the daughter shall not be barred to claim the estate tail: Then when the Mother dies, the estate tail is determined *quoad* her, and the daughter is in, in a remainder in fee, and so shall avoid the Lease. But all the Justices and Barons agreed, that although by the Fine the estate tail is barred *quoad* him who levied it, and his issue, yet it is not determined *in rei veritate*; and all strangers may say, that it is *in esse*; and the *Feme* who is Mother to the issue, remains always Tenant in tail: And when she made the Lease for years, be it with the ancient rent, or not, yet it is a good Lease, and shall bind all persons. And so it was resolved in *York* and *Sparhams case*, that such a Lease by the *Feme* shall bind. But whereas it was objected, that this Lease for years is an alienation within the Statute of 11 *H. 7.* For the *Feme* was Joyntress by the act of the *Baron*, therefore the issue by reason of the estate tail shall avoid this Lease, as it is held in *Sir George Browns case*, *Co. 3. fol. 50. b.* The Justices and Barons held, that it is without question; For, being but an ordinary Lease for 21 years, it cannot be said to be an alienation of the estate. But if she had accepted a Fine, and re-granted it for 1000 or 500 years, to change the Inheritance, that peradventure might have been within the Statute: But as the case is, it is without question; Wherefore the Judgment was affirmed.

Hob. 332

Yelv. 51.
1 Cr. 435-478.
Co. 9. 140. a.

1 Rol. 843

Co. 3. 51. b.

Termino

Termino Michaelis,

Anno vicesimo secundo J A C O B I Regis.

- (1) **M**emorandum, Upon Monday 18 October this Term, Sir William Jones, one of the Justices of the Common Bench, was made Justice of the Kings Bench; and Sir Thomas Chamberlaine, one of the Justices of the Kings Bench, having a Writ of Discharge delivered him, and appointed to be made Justice of Chester. Sir James Whitlock (who was Justice of Chester) was sworn one of the Justices of the Kings Bench in his place. And Francis Harvey, one of the ancient Serjeants, was the same day made Justice of the Common Bench, and sworn in the place of Justice Jones, but after Justice Whitlock.

Holms versus Toftwood.

- (2) **A**ssumpsit for that the Defendant, 20 Aug. 21 Jac. being indebted unto the Plaintiff 15 l. (which he had borrowed of him) promised to pay it upon request; & alledged Request and Non-payment: The Defendant pleaded, that before the said 20. Aug. 21 Jac. he was indebted to the Plain. in the said sum of 15 l. and paid the said 15 l. before the said 20. Aug. 21 Jac. viz. Upon the 20. Jun. 21 Jac. to J.S. the Plaintiffs Factor to the use of the Plaintiff, Absque hoc quod postea assumpsit modo & forma, &c. The Plaintiff saith, Quod postea assumpsit modo & forma: Whereupon Issue was joyned, and found for the Plaintiff. And it was moved, that the Defendants Allegation of the payment of the said 15 l. takes away the consideration: And therefore he ought to have traversed the payment, and not the Assumpsit: For the Consideration being taken away, the Assumpsit falls, Sed non allocatur. Because the payment is alledged to be made to a Stranger, to the Plaintiffs use: And it is not averred, that he accepted thereof; or, that it was paid unto his servant by his command; for otherwise, it is no payment. Also when the issue is, Quod postea Assumpsit, and found for the Plaintiff, it is to be intended, that it was afterwards lent by the Plaintiff; which is found by the Verdict, in finding Quod assumpsit. For otherwise they may not find the promise according to the Declaration. Wherefore it was adjudged for the Plaintiff.

Ante 470.

Hodgeskins versus Whood, Trin. 19 Jac. Rot. 596. in C.B.

- (3) **E**jectione firmæ upon a special Verdict, the Case was, that John Rogers was seised of this Land in Fee, holden in Socage, and devised it by his Will in writing to his Feme for her life, Remainder in Fee, &c. And afterwards leased by writing the said lands for two years,

1 Cr. 23.

years, to begin after his death. Whether that were a countermand of the Will, was the question. Henden Serjeant moved, that it was not any countermand, but only for the two years; & cited one Marshals case in this Court, Mich. 2 Jac. to be adjudged accordingly. But Hutton and Winch being only in Court, conceived it to be doubtful, in regard the Lease is made to take effect at the same time when the Will takes his effect. But if he had made the Lease for years to commence presently, which might well have determined in his life, it had not been a countermand. Therefore they required him to search the presidents by him cited, and to shew them in Court, and then they would deliver their Resolutions, p. q. adjournatur. Ante 49. 1 Cr. 24. 3 Cr. 721. 1 Cr. 23, 24.

Woodley *versus* the Bishop of Excester, Manwaring and Edwards.

Quare Impedit, for the Church of Tedlin in the County of Devon. The Plaintiff entitles himself by grant of the next Avoidance; and shews, that the Incumbent was created Bishop of in Ireland; And that afterwards the King granted to the said Bishop, to have and retain the said Church for six years in Commendam: The Incumbent died, whereby the Church became void; whereupon the Plaintiff presented, &c. The Defendant pleaded an insufficient Plea, whereto it was demurred. And this Case, being oftentimes argued at the Bar, was this Term argued at the Bench by Hutton, Winch and Hobart; who all agreed, that the Plaintiff was to be barred, for he hath not sufficiently entitled himself in his Declaration. Hutton conceived, that the Church was void by the Incumbents being created a Bishop of Ireland, as well as if he had been made a Bishop in England; For he having taken a greater charge, and the government of a Church, hath made void the first Benefice. But he held, that the King had not any title to present by the Incumbents being created a Bishop, but only where the King is Patron of the same Benefice: Nor is there any Book to warrant it, but only the Book of 5 Mariae pref. al. Esq. 61. But all ancient Books are to the contrary; as 41 E. 3. 5. 11 H. 4. 37. And that there was not any presentment as by Prerogative, where the Incumbent is created a Bishop, until of late days. Secondly, They all held, that when the Incumbent is created a Bishop, & the King presents, or grants that he shall hold it in Commendam, (which is quasi a Presentation, and he is thereby full Incumbent, and may plead as Incumbent) If the Grantee of the next Avoidance do not then present, he hath lost his Presentation; for he ought to have the next Avoidance, and he cannot have any other. And therefore they held, If the next Avoidance should be taken from him by a former title, as in Dower or by a Stat. or by other title whatsoever, that he hath lost it for ever; For he cannot claim any by his grant, but the next only: And denied the case put to be law; that if one devise the third Avoidance, & he dies, & the *Feme* recovers the third, that he should have the 4th Avoidance. V. 20 H. 8. Br. present. al. Esq. 52. 35 H. 8. ib. 55. 15 H. 7. 7. 29 H. 8. Dy. 35. Co. 8. 144. Thirdly, Hutton in his argument held, Chat (4) Jones 159. 3 Cr. 790. Doct. & Stud. 116. b. 3 Cr. 527: Dier 228. Co. Lit. 379. a.

Co. Lit. 297. a.

Dier 228. b.
Moor 399.
3 Cr. 527.

That the Commendator, although he hath it but for six years, yet hath power to retain it during his life ; And cannot be abridged by the limitation for six years, but is permanent Incumbent thereof during his life: And it is as a Confirmation or Attoynment, or Assent to a Legacy, and cannot abridge the Estate which is confirmed, &c. but that it shall enure according to the estate limited. And as to this point, Winch agreed with him. But for the interest which the King hath to present, when the Incumbent is created a Bishop, after Consecration ; Winch held, that the King hath an absolute title by his Prerogative, as well in case where a common person hath the Patronage, as where the King hath it : And he is not only as immediate Patron, or supreme Patron; because the Incumbency being void by his creating of him Bishop, he hath it by his Prerogative. And many sorts of presents, since the time of R. H. 8. were by him cited, where the Incumbent was created Bishop in England or Ireland, that such Presentments have been *ratione Prærogativæ*, and not as Patron. At the Lord Hobarts Argument, I was not present: But I heard, he agreed with them concerning the Grant of the next Avoidance ; that he had not any title to bring the *Quare Impedit* ; And that the Present of the King being in the next turn after the Grant, the Grant hath no remedy, but must suffer the prejudice by reason of the Prerogative. And they all agreed, that the Bar was ill ; For the Traverse is of the Conclusion. But because the Plaintiff hath not made a sufficient title in his Declaration, It was adjudged, *Quod nihil capiat per Breve*.

Austen versus Royden.

(5)

Ejectione firmæ of Lands in Aylesham. The Defendant pleaded, that Aylesham prædict. ubi Tenement. prædict. jacent, is within the Cinque-Ports, ubi Breve Domini Regis non currit, &c. The Plaintiff replies, that Aylesham prædict. is within the County of Suffex ; absque hoc, that Aylesham is within the Cinque-Ports. Whereupon the Defendant demurred ; for that he doth not traverse, that Aylesham wherein the Land lies, is within the Cinque-Ports. For it was said by Finch Serjeant, That by this Traverse, if any part of Aylesham be out of the Cinque-Ports, and in the County of Kent, as in truth this case is ; that part of the Village is within the Cinque-Ports and the other out ; And this Land is in that part which is within the Cinque-Ports: Yet by this Traverse the Defendant shall be tried. And for that, the Book of 50 E. 3. 5. was cited. But all the Court held, that the Replication and traverse is good : For by the Defendants plea it shall be intended, that the whole Village of Aylesham is within the Cinque-Ports ; And the addition, ubi Tenement. jacent, are but idle words ; And the Defendant ought first to have shewn, that part is within the Cinque-Ports, and part without, otherwise the Court shall not intend it. And forasmuch as he hath not shewn it, the Plaintiff hath the advantage by traversing, that Aylesham is not within the Cinque-Ports ; And the Replication was good, and adjudged for the Plaintiff.

Clerk

Clerk and Andrews Case in Chancery.

A Case was made and referred to Baron Bromley, and to Justices Winch, Doderidge and Hutton, to certify their Opinion. (6)
 The Case was agreed by the Council on both sides to be, — Joseph Mayn and John Mayn being obliged jointly and severally in a Statute Staple of 2000 l. An Extent was sued against them, and returned, that Joseph Mayn was seised in fee of the Mannor of Struckely in the County of Bucks, which was extended to the annual value of 40 l. And that he had not any other Lands, Nec est inventus, &c. And that John Mayn was seised in fee of Radnage-Farm in Radnage in the County of Bucks, to the annual value of 6 l. which was so extended, and his body taken, and that he had goods to the value of 28 l. And upon a Liberate returned, the Lands of Joseph Mayn were delivered in Extent, and the goods of John Mayn; and the Writ returned, served. Whereas in truth there was never any such Farm called Radnage-Farm: But by colour of that Extent, he entered into a Farm which John Mayn at the time of the Statute acknowledged had, called Little Johns, and sold it to Andrews, who was the Defendant in Chancery, who entered therein and evicted the Plaintiff; who thereupon prayed a New Extent, And whether he should have a New Extent as at the Common Law, against John Mayn, Or a Re-Extent, upon the Statute of 32 H.8. was the Question. And it was strongly urged, and argued before them by Sir Tho. Coventry Attorney-General, that he should have a New Extent against John Mayn at the Common Law: For the Lands being extended as the Lands of John Mayn, and he not having any such Lands, It is merely void, and as no Extent at all; For it is merely void at the Common Law; and he shall have a New Extent. But if he had extended Land whereof the Conusor was Disseisor, or had by defeasible title, as Feoffee upon Condition or otherwise, which had been afterwards evicted; There, so far as the Extent was once good, and he had received it and part of the profits thereof, towards payment of his Debt, he could not have any remedy by the Common Law, but was to have a Re-Extent by the Statute: But when the Extent was utterly void for the Lands of John, and they are several Obliges; For it is as no Extent against John; There shall be a New Extent. And in proof thereof he relied upon the book 30 E.1. Vouch. 297. where land in value being delivered, which was not the Plaintiffs land, he had a New Extent. And 13 Eliz. Dy. 299. where an Extent was returned, that the Conusor was seised of such Land, and shews not of what Estate, and that he was dead; It was a void Extent, and a New Extent was awarded. But against this was argued, That there could not be a New Extent, as the Case is: For although it might be where Land is extended, and appa-
 A u u u cantly

rantly void in it self, that there shall be a new extent; yet when two are obliged and severally, it is but one Debt: And when their several Lands are extended, and the goods of one of them in part of the Debt, and it is a void extent for the one, but he accepts it upon the Liberate: So as he hath the lands of the one well delivered in Extent, which he shall hold until he be satisfied; although the lands of the other be evicted, or that there never were any such lands delivered in Extent, yet he shall never have a new Extent against the other: For having taken satisfaction of the one, (which the Law intends, when he takes his Land by the Liberate) he shall never resort to have the Land of the other. And in proof thereof were cited 15 H. 7. 4. Co. 4. f. 66. Fulwoods case, & Co. 5. f. 87. Blomfields case, & 20. 3. Exec. 84. That at the Common Law Execution being sued, and the Lands of the one taken in Extent, and delivered upon the Liberate and accepted, he never shall have another Extent against the others Lands: And if he had the Lands in Extent, if any part remain unevicted, he never shall have other Extention by the Statute; For he hath not any remedy by the Statute, but where all is evicted. So here, when the Land of one of them remains in Extent, and he hath them, he shall never resort to any Execution against the other. And for that purpose, the Case betwixt Cowley and Lidiat, Trin. 11 Jac. Rot. 822. quod vide ante 338. was cited; where two were obliged jointly and severally, and were sued by several Præcipes, and condemned, and the Land of the one taken in Execution by Elegit, and afterwards the other taken in Execution by a Capias, It was adjudged to be ill, and discharged by Audita querela: For having the moiety of the Land of the one, it is as Satisfaction, and he cannot afterwards take the Body of the other. And of that opinion were Winch and Hutton clearly; That as this case is, he cannot have a new Extent or Re-extent: And if he should have it, yet it cannot be generally, as here it was, but upon a Scir. fac. But Baron Bromley and Doderidge doubted thereof; because no Lands of John were upon the matter extended, but it is merely void against him. But they agreed, that if any part of Johns Land had been well extended, it had been otherwise: For Doderidge said, If it should not be so, it would be very mischievous, when the Land of the one is not extended, by the negligence or voluntary act of the Sheriff, that all the charge should lie upon the other. Wherefore, forasmuch as they could not agree in opinion, they advised the parties to compound; And afterwards by their mediation the matter was finished by Arbitrement.

Alleley versus Colley, Mich. 22 Jac. in C. B.

- (7) **A**udita querela: For that he was obliged in an Obligation of 161. with Timothy Castalon, he being within age, the said Colley prosecuted an Original Writ in debt against him, and procured one William Legat an Attorney, without his notice, to appear to the Action, without any Warrant from him; and upon Non sum Informatus entered, and Judgment by default, he was taken in Execution.

Wherefore

Wherefore he prayeth upon this matter to be discharged: Whereupon it was demurred, and without Argument adjudged for the Defendant, that it is not a sufficient surmise to discharge; For he ought to take his remedy by writ of Deceit against the Attorney, and not to relieve himself by Audita querela.

Chadock *versus* Cowley in B. Reg.

Ejectione firmæ of lands in Bradmere, of a Lease of Will. Hydes, (8)
 Upon Not guilty pleaded, a special Verdict was found, that Will. Hydes the Lessors Grandfather was seised in fee of this Land in Bradmere and East-Leak, holden in Socage of that Mannor: And having two sons Thomas and Francis, devised them by his Will in this manner, viz. to his *Feme* for life, and after her death, all his lands in Bradmere to Thomas his son, and his heirs for ever; And his lands in Eastleak to Francis his son, and his heirs for ever. *Item*, I will, that the survivor of them shall be heir to the other, if either of them die without Issue: The *Feme* enters and dies, Thomas enters into the land in Bradmere, and devises them to Richard his second son in fee, under whom the Defendant claims. And William the eldest son of Thomas enters and lets it to the Plaintiff. Et si super, &c. The sole question was, Whether this devise be an estate tail immediate by the devise, or only a contingent estate, if he died without issue, in the life of his brother. And it was holden by all the Court (absente Lea) that it was an estate tail, so the Devise of Thomas was void; For although it were objected, that the words, The Survivor shall be heir to the other if he die without Issue, are idle: For it doth not appear, that he had any other children; And then when the one dies without issue, the other is his heir by the Law, and so he wills no more then the Law appoints: Sed non allocatur; For non constat, but that he might have other children, and that by several Venters: And by the Devise he intended to give it to the others by way of devise, if he died without issue. Secondly, for the words, That the Survivor shall be heir to the other if he dies without issue, they seem to be an estate tail: But if the devise had been, that if he died without issue in the life of the other, or before such an age, that then it shall remain to the other: Then peradventure it should be a contingent devise in tail, if it should happen, and not otherwise: But being That the Survivor shall be heir to the other, if he die without issue, that in his intent is an absolute estate tail immediately, and the remainder limited over, as 7 Ed. 6. Devise 38. is; and resembled it to the Case 9 Ed. 3. Tail 21. & 35 Aff. Pl. 14. & Co. 9. 128. & 16 El. Dy. 330. And that here, although the first part of the Will gives a fee, the second part corrects it, and makes it but an estate tail: Wherefore it was adjudged for the Plaintiff. Vide Dy. 354. & 122. & 124. And this Judgment was given upon the first Argument.

Ante 416.448.

Ante 551.

Ante 656.

Euface verſus Scawen, Trin. 19 Jac. Rot. 1393. in B. Reg.

(9)

Jones 55.
2 Rol. 86. 403.
4.

IN ſecond Deliverance, Upon a ſpecial Verdict the Caſe was ſuch, John Stile and Suſan a *Feme ſole* were Joyntenants for life, the *Feme takes Baron*, who by fine grants to the ſaid J. S. tenementa prædicta & totum & quicquid habent pro termino vit. of the ſaid *Suſan*, & illa ei reddidit, *Habendum* to him and his aſſigns, for the life of the ſaid *Suſan*, and warrants it to him and his heirs during the life of the ſaid *Suſan*. Whether this grant by fine ſhall enure by way of Releaſe, or by grant of the eſtate, and ſeverance of the Jointure of the moiety, ſo that this eſtate ſhall endure during the life of Suſan, was the queſtion. And after Argument at the Bar, it was reſolved, that it ſhall enure by way of Releaſe, and not to grant the eſtate: And although it be granted by fine, it as well enures by way of Releaſe, as a grant by *Dæd*; And the rather for the words *Ei reddidit*, which enures by way of Releaſe: And both eſtates being veſted in him, the Law ſhall veſt that in him as if he had it from the Feoffor. And although it were objected, that he had one eſtate from the Feoffor by *Dæd*, and the other eſtate by the Fine; ſo being by matter of Record, he cannot divide it: Yet it was ſaid, that both eſtates being veſted in him, the Law ſhall adjuſt it in him, as by the firſt limitation. And Doderidge held, that by whatſoever means he comes to the eſtate of his companion, it ſhall enure by way of Releaſe; And that he ſhall be ſaid in, of the entire eſtate, as by the feoffment. And therefore if one Joyntenant bargains and ſells by *dæd* inrolled to his companion, although that veſts the uſe, and the Statute veſts the poſſeſſion, yet being in him, the Law ſhall conſtrue it to be intirely in him, and not by diſiſion of eſtate: Therefore it was reſolved by them all, that there was no occupancy for that moiety of Suſans, But it determined by the death of J. S. and adjuſtged for the Plaintiff.

Co. Lit. 273. b.

2 Rol. 86.
Co. Lit. 41. b.

Foy verſus Hynde, Hill. 17 Jac. Rot. 652. B. R.

(10)

Jones 55.

Ejeſtione firmæ, of Lands in Lillington, of a Leaſe of Rich. Keylewey: Upon Not guilty pleaded, a ſpecial Verdict was found, that Martin Keylewey was ſeiſed in fee of this Land, holden in Soccage, and made his Will in writing, in this manner: For the good will I bear to the name of the *Keyleways*, as alſo I deſire by the grace of God, that all my Lands may have continuance in the name of the *Keyleways*, I give and deviſe unto the heirs males of my body, all my lands whereſoever. And for default of ſuch iſſue, my will is to intail all my ſaid lands to my Nephew *H. Keylewey*, and the heirs males of his body. And for default of ſuch iſſue, to his brother *T. Keylewey*, and the heirs males of his body, and ſo to *Will. Keylewey*, *Chriſtopher Keylewey*, and *Rob. Keylewey*. And for default of ſuch iſſue, to the right heirs of the ſaid *Martin*, *Habendum* to them ſeverally, and to the heirs males of their bodies, to the only intent and true meaning of this my Will, and ſo long as they and every of them do perform and keep the true meaning thereof, touching the intailing of all my ſaid lands in manner

manner and form following, and not otherwise. And therefore I give and bequeath all my said Lands after the decease of the heirs males of my body without issue, unto the said *H. Keyleway*, and the heirs males of his body, until such time as the said *Hen. Keyleway*, or an issue male of his body shall effectually and expressly assent, conclude, do, or go about to do, or make any act or acts, to alter, discontinue, or change this estate Tail, or any part thereof, or of any part of the Lands; or shall expressly or directly go about to alter or change the meaning of this my Will, touching these my lands, or any part thereof, other than in making Leases for 21 years, rendring the ancient rent, That then my Will is, and I do give and bequeath all my said Lands to the said *T. Keyleway*, and the heirs males of his body; And that it shall be lawful to and for him the said *T. K.* and the heirs males of his body, immediately upon such assent, conclusion, making or going about as aforesaid to enter into all the said Lands, and the same to have and enjoy unto the said *T. K.* and the heirs males of his body, until such time as he shall effectually, &c. *Et sic verbatim*, as before. It is limited to William, Christopher, and Robert, every one of them severally. And afterward Martin the Devisor died without issue, Henry Keyleway entered, and had issue Robert, afterward Tho. Keyleway died, having issue Rich. the Lessor. Hen. and Rob. his son levy a fine *sur consueance de droit come ceo*, &c. to Will. Hynd, which was by expresse agreement betwixt them, to the use of him and his heirs; Rich. enters, and lets to the Pl. & the Def. ousts him: *Et si super*, &c. Two questions were made; First, whether there were here an immediate Devise unto them the one after the other, by the first part of the Will; or that it were a declaration of his intent, & no devise of the lands: And then whether by the second part of the Will, it is but a contingent limitation to Tho. if Hen. do go about to alien, &c. For then it is clear that Rich. had no title; Because the alienation was not in the life of Tho. so as his heir cannot take by such a devise, when it never attached in the father: But as to that, all the Justices conceived, that it was an immediate devise by the first part, and not only contingent, for then all his intent should be destroyed. For if there had not been an alienation, none of them in remainder should have had it, which never was his intent; But that every of them should have it, the one after the other, if they died without issue. The second point (which was often argued at the Bar by Sir Hen. Yelv. & Serjeant Darnport for the Pl. and by Germyn and my self for the Def.) was, whether this kind of perpetuity be allowable, and whether it were a limitation annexed to the estate of Hen. And were such a limitation, which absolutely determined his estate by his assenting to levy the fine, so as the fine levied (there being no Proclamation found) shall be a discontinuance: or that the course of the Common Law shall be restrained by such a limitation, & make the fine as no discontinuance, to take away the entry of him in remainder, but shall be a forfeiture of the Conusors estate, whereof he in remainder shall take advantage by entry and avoid it in case of a Will: And all the Court who
delivered

delivered their opinions *seriatim*, agreed and resolved, that it is a perpetuity condemned in our Law-books, & repugnant to the Law, and not allowable; For he may not determine an estate tail by such a limitation, nor can he give title to another to enter who is a stranger; for by the fine, there is a discontinuance of the remainder, & a devesting thereof, so as he cannot enter: For it is no limitation to enter, but after the effectual going about; and it is not effectual until the act done; And when the act is done, the remainder is discontinued, and then he cannot enter. Also they held, that these are ambiguous and uncertain words, to make the limitation of an Inheritance by the determination thereof, and therefore void and repugnant to law, and the law will never give allowance unto it: wherefore they held that the case was all one with the reasons in the cases of *Sir Anth. Mildmay*, Co. 6. f. 40. Co. 1. f. 84. *Corbets case*, Co. 9. f. 127. Co. 10. f. 389. *Portingtons Case*; and directly within the rule of *Plesingtons Case*, 6 R. 2. Wherefore it was adjudged for the Defendant.

Jones 58. 9.

Sympson versus Juxon.

- (5) **E**rror of a Judgment in Durham for the Plaintiff: The Judgment being reversed in the Kings Bench, a writ of Restitution was awarded, and to enquire what were the profits of the Land recovered, à tempore judicii prædicti, which was 7. Aug. 19 Jac. whereupon the Inquisition was returned, that they amounted to 10 l. And Exception was taken to the Writ; For it ought not to have been, what the profits of the land amounted unto from the Judgment: For the Plaintiff is not to answer the profits longer then from the time of the Execution sued, which was long after: And so held all the Court; Wherefore the writ was ruled to be ill, and the Plaintiff in the Writ of Error had a new Writ of Restitution, which was to enquire what profits of the land the Plaintiff who recovered, had taken colore judicii prædicti, which was 7. Aug. 19 Jac. and after the reversal thereof; which being returned, that he took the profits of the land colore judicii prædicti, before the reversal thereof to the value of 10 l. An Exception was taken thereto by Sir Henry Yelverton, and Serjeant Dampart that this Writ was not good; For it ought to have been, what profits he took after the Execution sued; For that appears of Record to be long after the Judgment. But all the Court held that the Writ was good enough; For the Plaintiff in the Writ of Error, after the reversal, is to be restored to all what he lost, and what the Plaintiff in the Judgment by colour thereof had taken after the Judgment. And that may be well, by entry after the Judgment (as in truth the case was affirmed to be) in part, and yet after sue Execution of the remainder: Wherefore the Writ was well made; And so Broom the Secondary, and the Clerks, affirmed their Presidents to be. Wherefore the Writ was ordered to be filed, and the Plaintiff had Execution of the damages found by that Writ. I my self was of Counsel with the Plaintiff in the Writ of Error, by assignment in Forma Pauperis.

Termino

Termino Hillarii,

Anno vicesimo secundo JACOBI Regis
in Banco Regis.

Memorandum, in the Vacation betwixt Mich. Term, Sir James Lea Chief Justice of the Kings Bench was made Lord Treasurer of England; And by special Commission (after the Staff was delivered him) was sworn in the Exchequer, yet continued Chief Justice until 23. January, 1624. And afterwards, viz. 28. January Sir Ramulph Crew one of the Kings Serjeants was made Chief Justice by the Kings Writ.

Memorandum, Upon the 4th of February the same Term, Sir Humphrey Winch, one of the Justices of the Common Bench, a Learned and Religious Judge, died: And upon the 11. of February I was made Justice of the Common Bench, in his place. And first, I took the Oath of Supremacy, and then the Oath of Allegiance made 3 Jac. and then the Oath of a Judge, set down 18 Ed.3. cap.3.

Heliot versus Sanders.

Replevin: Upon Demurrer the case was such; One Brasebridg (1)
Tenant in tail of a Rent-charge out of the Mannor of Kinf-
bury, granted by Sir Ambrose Cave, levies a Fine of the Mannor
to Sir A. C. and his heirs; And this Fine with Proclamation was
pleaded in Bar of the Aduow for this rent, by the heir in tail;
Which fine was levied of this rent per nomina Manerii, &c. with an Ante 11.
averment that this fine was levied with an intent to bar the rent
by agreement of the parties, and to the use of the Conusee and his
heirs. The Defendant pleaded Non comprised; whereupon being
demurred, and argued divers times at the Bar, it was now argued
at the Bench; And Harvey and the Lord Hobert held, that this rent
is barred by this fine with Proclamation, by the Statute of 4 H. 7.
and 32 H. 8. because the fine being levied of the land, inclusively
gives the rent, and is a fine to bar it, as well as a fine of the rent
it self; For it is directed by the agreement of the parties: And as
where Tenant in tail of a Rent purchases the Land, and enfeoffs
a stranger with Warranty, that gives the land discharged of the
Rent, and that Warranty extends thereto; So it seemeth this
fine shall bar the Rent; For the fine of the land is an inclusive
gift of the Rent therein; And not like to the Case in 4 El. Dy. 213.
where Tenant for life, Remainder in tail; Tenant for life levies
a fine to him in Remainder, and he render Rent; Tenant in tail
dies;

dies, it shall not bind the issue of tenant in tail ; For there was not any fine levied of the thing intailed. And denied the Case put by Thornton, in Plow. 435. to be Law in this point. And therefore to say, Not comprised, &c. is no plea, but he ought to have answered to the fine ; For otherwise by such plea he shall put the matter in Law *in bouch del ley gents* ; Wherefore it is no plea : But Hutton strongly argued to the contrary, that this Fine is no bar of this rent, unless it had been expressly mentioned in the Fine. And that this Fine is not within any of the Statutes, not being levied of any thing intailed.

An

AN EXACT TABLE,

Referring to those many Points of Law argued and
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MAR 31 1936

